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SUPREME COURT, U.S.

No. 81-6352

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

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ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY,
STATE OF GEORGIA

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# PETITION FOR WRIT OF CERTIORARI

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LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

MARTIN R. GOLD
HOWARD L. WIEDER
PAUL V. LiCALSI
JANE G. STEVENS
595 Madison Avenue
New York, New York 10022

Attorneys for Petitioner

## QUESTIONS PRESENTED

1. WHETHER A CONVICTION IN A CAPITAL CASE BASED SOLELY UPON A CONFESSION AND EVIDENCE DERIVED THEREFROM WAS OBTAINED IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHERE THE CONFESSION WAS OBTAINED UNDER THE FOLLOWING CIRCUMSTANCES:

A. IT WAS MADE AFTER 18 HOURS OF INTERROGATION CONDUCTED WITHOUT INFORMING PETITIONER THAT HIS ATTORNEY'S REPEATED ATTEMPTS TO COMMUNICATE WITH HIM HAD BEEN UNSUCCESSFUL BECAUSE LAW ENFORCEMENT OFFICIALS HAD LIED TO THE ATTORNEY AS TO PETITIONER'S WHEREABOUTS.

B. THE ALLEGED PROBABLE CAUSE FOR PETITIONER'S ARREST, AS CREDITED BY THE GEORGIA COURTS, CONSISTED SOLELY OF THE FACT THAT PETITIONER WAS A BLACK SOLDIER ON A MILITARY BASE WHO HAD BEEN SEEN WITH A PROSTITUTE IN A LOCAL BAR, ON THE BASIS OF WHICH THE UNITED STATES ARMY COURT OF MILITARY REVIEW HAS HELD THE SAME ARREST IMPROPER AND THE CONFESSION INADMISSIBLE?

2. WAS PETITIONER DENIED DUE PROCESS OF LAW AND THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN THE COURT FAILED TO CONDUCT ANY INQUIRY AS TO PETITIONER'S MENTAL COMPETENCE TO STAND TRIAL, OR TO CONDUCT ANY MEANINGFUL INQUIRY ON HIS DEMAND TO ACT AS HIS OWN LEAD COUNSEL WHEN THE FOLLOWING APPEARED:

A. THE CRIME CHARGED AND THE SURROUNDING FACTS SUGGEST THE ACTIONS OF A SEVERELY MENTALLY DISTURBED PERSON;

B. A CLINICAL PSYCHOLOGIST REPORTED, IN PART:

"MY IMPRESSION TO DATE IS THAT MR. HANCE MAY NOT BE CAPABLE OF ASSISTING IN AN APPROPRIATE, RATIONAL WAY IN HIS OWN DEFENSE.";

(C) THE STATE PSYCHOLOGIST (WHO CONCLUDED THAT PETITIONER WAS COMPETENT TO STAND TRIAL) REPORTED, IN PART:

"[PERSONS SUFFERING FROM PETITIONER'S MALADY] TEND NOT TO BE PARTICULARLY ABLE TO THINK FOR THEMSELVES AND THEIR EMOTIONAL DIFFICULTIES FREQUENTLY INTERFERE WITH THEIR JUDGMENT SUCH THAT THEY OFTEN APPEAR TO LACK COMMON SENSE IN EVERYDAY MATTERS."?

3. WAS PETITIONER DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS WHERE ASSIGNED COUNSEL, INTER ALIA, FAILED TO PRESENT AN INSANITY DEFENSE; RAISE ANY PRE-TRIAL CHALLENGE TO THE LEGALITY OF PETITIONER'S ARREST; CONTEST BY EVIDENCE THE CRITICAL ISSUE OF THE LACK OF THE COURT'S JURISDICTION AND THE IMPROPRIETY OF THE VENUE OF THE TRIAL; OBJECT TO THE ADMISSION OF A TEN-YEAR-OLD ARREST ON SIMILAR FACTS; OBJECT TO THE ADMISSION OF CORPSE FRAGMENTS AND OTHER INFLAMMATORY EVIDENCE; OBJECT TO IMPROPER AND PREJUDICIAL ARGUMENT BY THE STATE ON SUMMATION; OR OBJECT TO THE PATENTLY ERRONEOUS CHARGES BY THE COURT THAT DEFENDANT IS PRESUMED TO BE OF SOUND MIND AND INTENDS THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACTS, AND THAT MALICE SHALL BE IMPLIED?

4. WHETHER, DURING THE SENTENCING PHASE OF TRIAL, WHERE THE JURY WAS TO CONSIDER THE DEATH PENALTY, THE ORDER OF THE COURT ABSOLUTELY BARRING PETITIONER FROM INTRODUCING ANY EVIDENCE REGARDING HIS STATE OF MIND AT THE COMMISSION OF THE CRIME AND AT TRIAL VIOLATED PETITIONER'S RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS IN CAPITAL CASES?

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No. 81 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

---

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

---

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY,
STATE OF GEORGIA

---

# PETITION FOR WRIT OF CERTIORARI

---

Petitioner William Henry Hance respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of Butts County in this capital case.

## CITATION TO OPINIONS BELOW

The Order of the Superior Court of Butts County, entered July 29, 1981, dismissing the habeas corpus petition, and the Order of the Supreme Court of Georgia, entered October 9, 1981, denying a certificate of probable cause to appeal, have not been published in the official reports, but are contained in the separately bound Appendices to the instant petition. Prior opinions integral to this case are United States v. Hance, 10

M.J. 622 (A.C.M.R. 1980), and Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 449 U.S. 1067 (1980), reh'g denied, 449 U.S. 1135 (1981), and copies of both opinions are also contained in the Appendices.

## STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and herein the deprivation of rights secured by the Constitution of the United States. The judgment of the Supreme Court of Georgia on direct appeal, affirming petitioner's conviction of murder and attempted theft by extortion, was entered on June 24, 1980. A timely petition for rehearing was denied by that court on July 15, 1980. This Court denied certiorari on December 15, 1980, and a timely petition for rehearing on January 26, 1981. The Superior Court of Butts County, Georgia, dismissed the habeas corpus petition in an order entered July 29, 1981. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on October 9, 1981. On December 23, 1981, Mr. Justice Powell, upon consideration of the application of counsel for petitioner, ordered that the time for filing a petition for writ of certiorari be extended to and including March 8, 1982. On March 8, 1982, petitioner filed this petition for a writ of certiorari in a timely manner pursuant to Rule 28.2 of the Rules of this Court, and a motion to proceed in forma pauperis, accompanied by supporting affidavits pursuant to Rule 46 of this Court.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United

States. Their pertinent parts are included in the Appendices.

## STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the Superior Court of Butts County, Georgia from its dismissal of petitioner's writ of habeas corpus.

On December 16, 1978, petitioner, a soldier stationed at Fort Benning, Georgia, was sentenced to death for the murder of Gail Jackson. The conviction was affirmed by the Supreme Court of Georgia [Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980)], and this Court denied certiorari and a rehearing [449 U.S. 1067 (1980), reh'g denied, 449 U.S. 1135 (1981)].

The sole evidence against petitioner was his own confession and its subsequent corroboration. The confession was obtained by military and civilian investigators, working together, after eighteen hours of interrogation. During that confession, petitioner admitted to having murdered three women.

He was convicted of two of these murders by a military court, but the United States Army Court of Military Review reversed, holding that there was no probable cause to support the arrest which led to the intensive interrogation of petitioner. Use of the same confession in petitioner's trial for the death of Gail Jackson has not troubled the Georgia courts despite the paucity of probable cause to support petitioner's arrest, and the fact that the confession followed eighteen hours of questioning during which petitioner's lawyer repeatedly tried to contact him. Petitioner's lawyer was unable to do so because law enforcement officials lied to the attorney as to petitioner's whereabouts, and failed to advise petitioner that his attorney was seeking to confer with him.

The brutal and irrational murders, letters to the police sent by the "Forces of Evil," and other surrounding circumstances clearly suggest a mental aberration by the perpetrator. Psychiatric evaluations of petitioner raised serious questions as to his sanity. The court, however, failed to make any inquiry as to his competency to stand trial, and made only a perfunctory inquiry when allowing petitioner to act as his own lead counsel.

The trial was incompetently defended by petitioner and his assigned counsel. Fundamental rights and elementary objections were waived. Finally, at the trial on sentence, the court barred petitioner from introducing any evidence on his state of mind at the time of the commission of the crime.

## The Lack Of Probable Cause

Between March 3 and April 5, 1978, when a series of strangulation murders were occuring in Columbus, Georgia (Tr. 834), its Police Chief received a series of six letters containing ravings from "The Forces of Evil" (Tr. 428-33, 435-36, 445-47, 449, 452-53).* All the letters were handprinted and most of them were written on and mailed in United States Army stationery with a written return address for the "Forces of Evil" (See State's Exhibits 1-6, contained in Appendices). Army stationery is easily available to all service people (Tr. 846), and military personnel are quite common in Columbus, which is near Fort Benning. The letters, reproduced in full in the Appendices, clearly reflect the writer's highly disturbed and unstable mind. The

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* "Tr." references are to the transcript of the petitioner's civilian trial of December 11-16, 1978, in the Superior Court of Muscogee County, Georgia.

writer, speaking as "The Chairman of All the Forces of Evil" (see, e.g., Tr. 430, State's Exh. 2), threatened that, unless the Police Chief captured the stocking strangler, he would be forced to kill black women in Columbus, including two women whom, the writer alleged, the "Forces" had been holding captive.

On the afternoon of March 30, a caller, who sounded like a black male, made two telephone calls, one to the military police desk at Fort Benning and the other to the Columbus Police Department, specifying the place where the body of Gail Jackson might be found. The caller used the Sand Hill Bar and Grill as a geographical reference and for distance measurement used the term of "meters" (Tr. 459-61, 463, 466, 468, 471-73, 475). The body was found at the described location (Tr. 488).

On April 3, 1978, a caller, who sounded like a black male and who identified himself as a member of the "Forces of Evil," telephoned the military police desk at Fort Benning and said that Irene Thirkield's body may be found at Maertens Range on Fort Benning (Tr. 626). The body was found at the specified location (Tr. 631).

Agent Richard Fox, of the U.S. Army Central Investigation Division ["C.I.D."], talked to "a girl named Peaches" who said she once saw the deceased Irene with the petitioner -- who was a black male soldier stationed at Fort Benning (Tr. 727-28). Agent Fox testified at the suppression hearing conducted during trial outside the presence of the jury:

> [Mr. Hance:] Mr. Fox, would you tell the Court what you did have on me as far as I was concerned before my name got on that confession?
>
> A. I had been -- I received information that you had given Irene a ride to the Sand Hill Bar.

Q. I'm talking about as far as I was concerned besides that?

A. Nothing.

(Tr. 697-98)

At trial, but not during the suppression hearing, the State produced a witness, Deborah Jones, who stated that she saw the petitioner and Irene at a bar on March 15, 1978 (Tr. 606, 610-11). The State then produced three other witnesses, none of whom could identify petitioner as the uniformed soldier who was with Irene that evening (Tr. 614, 618, 620-21). One of these witnesses, Johnny King, testified that the soldier and Irene gave him a lift before they continued in the direction of another bar (Tr. 623). There is no evidence that any law enforcement agent spoke with Deborah Jones or the three other witnesses who could not identify petitioner prior to petitioner's arrest or seizure. Fox's information came from only "Peaches," who was not brought to court to testify. Petitioner was then arrested and, in the three-day interrogation that followed, confessed to the homicides of Brenda Gail Faison (also known as "Gail Jackson"), Irene Thirkield, and Karen Hickman.

The Supreme Court of Georgia Found
Probable Cause For Petitioner's Arrest

On these facts, the Supreme Court of Georgia found probable cause for appellant's arrest. The Court said:

> Agents of the military police were in possession of the following information prior to appellant's arrest. First, from the phone calls they knew the person who killed the victims was a young black male. Second, they knew that the perpetrator was a soldier because the calls they received showed an intimate knowledge of the military reservation

> and the letters were written on military stationery. Also, a military cap was found near one of the bodies. Finally, they knew that the appellant, a young black male soldier, was the last person seen with a victim prior to her death. Such information would lead a reasonably cautious person to believe that appellant had committed the offense, thereby furnishing probable cause for his arrest.

Hance v. State, 245 Ga. 856, 864, 268 S.E.2d 339, 347, cert. denied, 449 U.S. 1067 (1980).

The United States Army Court Of Military Review Found There Was No Probable Cause For Petitioner's Arrest

Following his civilian trial for the homicide of Gail Jackson, petitioner was tried by the Army on May 15 - June 8, 1979, for the deaths of Irene Thirkield and Karen Hickman. He was convicted on June 8, 1979, and sentenced to hard labor for life. The evidence for the two murder charges in the military trial consisted of the identical facts involving probable cause, the same interrogation, and the ensuing confessions as in the state court trial. The federal military appellate court reversed the convictions. The court held:

> We are not satisfied that the evidence presented by the Government was sufficient to warrant a prudent person in concluding that the apellant had committed an offense. The information certainly warranted additional questioning but fell short of establishing probable cause to arrest the appellant.
>
> * * *
>
> The Government has failed to establish the legality of the appellant's apprehension and has not demonstrated that this taint was dissipated. The resulting confessions and other derivative evidence therefore were inadmissible.

United States v. Hance, 10 M.J. 622, 625, 627 (A.C.M.R. 1980) (footnote references omitted) (copy of opinion contained in Appendices). The court, rather than dismiss the charges, remanded the case for a rehearing as to probable cause because the Government contended it had an additional proffer of evidence on the subject consisting of an alleged identification of petitioner's voice by his commanding officers. The Army, however, decided to dismiss the charges against petitioner.

The State Habeas Corpus Proceeding

The matter of the voice identification was introduced at the state habeas corpus proceeding. Former C.I.D. Agent Marvin Besson testified that the telephone call made on April 3, described above, to the military police desk had been tape-recorded [Transcript of State Habeas Corpus Proceeding of April 8, 1981, at 19 (hereinafter "Habeas Transcript")]. Later that afternoon or evening, the C.I.D. learned that petitioner had been seen once with one of the deceased women (id. at 18, 20). Based on this information supplied by "Peaches," Besson, the next morning of April 4, called petitioner's commanding officer and first sergeant to C.I.D. headquarters and played the tape recording for them. According to Besson, while "they felt it was Hance's voice," they could not say so with certainty, and the recorded sounds had no outstanding or distinguishing characteristic (id. at 19, 21, 24, 50-51). The State failed to call petitioner's commanding officer or first sergeant to testify. Agent Besson testified at the military trial that the uncertain identification of the telephone recording and the information that petitioner had been seen with one of the deceased

women, did not constitute probable cause for the petitioner's arrest on April 4 (United States v. Hance, supra at 625 n.5).

The state habeas corpus court was concerned by the probable cause issue. After Besson testified as to the sparse information in his possession, the court stated: "Well, I didn't understand why you and Mr. Fox thought Mr. Hance had anything to do with it" (Habeas Transcript at 23; accord, id. at 43-44). The court made no new findings of fact; it merely cited the Georgia Supreme Court's opinion, quoted above, finding that the arrest was based on probable cause and that petitioner had been given the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). Order of Superior Court of Butts County, entered July 29, 1981, at 2, ¶¶ 7-8, and 12, ¶ 2 (contained in Appendices).

The issue of probable cause was properly preserved at trial by the legally untrained petitioner himself who argued to both the court and the jury that Agent Fox had no evidence to arrest him (Tr. 704, 929, 967, 1040-41). The issue was presented to the Georgia Supreme Court on direct appeal (Supplemental Brief of Appellant to Supreme Court of Georgia, at 1-8), and the court found probable cause (Hance v. State, supra at 863-64, 268 S.E.2d at 346-47). Its decision was adopted by the state habeas corpus court (Order, Superior Court of Butts County, ¶¶ 7-8, at 2, & ¶ 2, at 12; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument I, at 1-3; Petition for Writ of Habeas Corpus, ¶¶ 7-8; Amendment to Petition for Writ of Habeas Corpus, ¶ 2, at 1) (contained in Appendices).

The Three Day Interrogation

On April 4, 1978, Agents Besson and Fox telephoned petitioner's commanding officer to say they were coming to get petitioner, who was the focus of the investigation (Habeas

Transcript at 38, 41; Tr. 678-80, 751). Petitioner was ordered to his superior's office. Petitioner had no options; he had to obey (Habeas Transcript at 26; Tr. 680, 751). Petitioner was not questioned where he was found. Instead, he was immediately taken from his unit and placed in a C.I.D. car, where he was told not to make any statements yet about the deceased women, transported to C.I.D. headquarters, and placed in an interrogation room (Habeas Transcript at 26, 38-39; Tr. 680, 751, 785-86, 992). He was not free to leave at any time thereafter (Habeas Transcript at 25, 39-41, 45; Tr. 688). His freedom to move was limited to "get[ting] up" occasionally from his interrogation chair (Tr. 782) "[j]ust for him being allowed to go to the latrine, and that was it." (Tr. 766; emphasis supplied). Both the U.S. Army Court of Military Review and the Supreme Court of Georgia found that petitioner was under arrest. United States v. Hance, supra at 624-25; Hance v. State, supra at 863-64, 268 S.E.2d at 347.

The arrest was designed to produce incriminating statements from petitioner. Agent Besson conceded that no probable cause existed when petitioner was arrested on April 4 (United States v. Hance, supra at 625 n.5), but that petitioner had become the focus of their investigation and it was hoped that interrogation might be "productive" (Habeas Transcript at 30, 38, 41). Agent Fox admitted that had the interrogation not been successful, he would have had to send petitioner back to his unit and search for more evidence specifically "to tie him into it" (Habeas Transcript at 42-43, 48-49).

The interrogation began immediately upon arrival at C.I.D. headquarters at 1:45 P.M. (Tr. 680-81, 752). Petitioner was advised of the charge of murder and was read his rights,

which he waived (Tr. 683, 782, 992). Agent Fox confronted petitioner with the fact that he had been seen with the deceased Irene Thirkield (Tr. 752). Petitioner readily admitted this fact (Tr. 783-84). The petitioner made incriminating statements during the first day of the interrogation, as both the U.S. Army Court of Military Review and the Supreme Court of Georgia found (United States v. Hance, supra at 626-27; Hance v. State, supra at 859, 268 S.E.2d at 344; Tr. 759-61, 994-95; Habeas Transcript at 29-30. But see Tr. 783-84 suggesting that the admissions were made the next day). The statements petitioner made included that the "Forces of Evil" compelled him to write the letters and make the telephone calls.

During the first day, petitioner signed forms consenting to voice and handwriting exemplars and a search of his room (Tr. 687, 722). A search conducted on April 4 of petitioner's desk turned up Army stationery, a standard item available to all service people (Tr. 843-44, 846).

The interrogation room, as Fox described, "was secured and we had a sign out 'Do Not Enter, Interview in Progress.'" (Tr. 785). During the entire interrogation, petitioner was kept isolated (Habeas Transcript at 29). The only persons allowed in during the interrogation were messengers who brought in coffees and Cokes at Fox's command (Tr. 786). The interrogation by Agents Fox and Besson on April 4 lasted from 1:45 P.M. - 10:20 P.M., and was immediately followed by an interrogation conducted by the Federal Bureau of Investigation and the Columbus Police Department which lasted from 10:20 P.M. until at least 11:20 P.M. (Tr. 680-81, 685, 687, 723, 737, 755, 787, 930-31). Petitioner was then kept under guard and allowed some sleep, but Agent Fox did not recall how much (Tr 732, 780).

According to the law enforcement agents, petitioner never demanded a lawyer throughout his questioning (Tr. 685, 692, 712, 757, 767, 987, 993-94). Fox stated that when he advised petitioner, after the confession was made and signed on the second day, that a lawyer had been retained for him, petitioner declined to talk with him. (Tr. 697, 778; Habeas Transcript at 34). Petitioner, however, insisted at trial that he asked for counsel, but that Agent Fox told him that his request could no longer be honored since he had signed a written waiver of counsel (Tr. 930, 945, 952-54, 960). The trial judge's findings of fact are ambiguous on whether petitioner asked for counsel. The court, finding the confession voluntarily made, stated, in pertinent part:

> THE COURT: I believe the only issue is on the Court to make a finding as to voluntariness . . .
>
> • • •
>
> . . . I do so find that he was properly advised of his rights. I believe by his own statement he indicated that he was advised, although he testified that he at one point wished to have an attorney. (Tr. 742-43).

## Police Kept Petitioner's Lawyer Away From His Client

Meanwhile, on April 4, attorney David Clark of Columbus received a telephone call from his secretary that the afternoon newspapers of that day reported that William Henry Hance -- his client of two years standing -- had been arrested at Fort Benning and charged with murder. Attorney Clark obtained the newspaper and read the article. In light of their previous relationship, Clark felt compelled to see Hance and advise him preliminarily

(Tr. 907).*

On the afternoon of April 4, while the questioning of Hance was beginning, attorney Clark made six or eight attempts as chronicled below -- in person and by telephone -- to locate his client. Clark testified:

> . . . I tried to locate him. I looked at the article to see exactly what it said, and then called the Columbus Police Department and asked them if they had Mr. Hance there, and they told me that they didn't, that they believed he was at Fort Benning. I called the County Jail and they told me they thought he was at Fort Benning. I called the stockade at Fort Benning, they said he had been sent to Columbus, they didn't have him. They suggested I call P.M.O., Provost Marshal's Office.
>
> * * *
>
> I talked to the people at P.M.O. and they said they did have Hance, [but] that he had been sent downtown. And so, I went by the Police Department to see if they in fact did have him, and I believe I saw Russell Traino over there that evening and I asked Russell if he knew anything about it, and he said, no. I stopped into the Detective Office, and they said they didn't have him. So, I checked Fort Benning and Columbus and couldn't locate him.
>
> Q. No one admitted to you that they had him in their custody anywhere, is that right?
>
> A. That's correct.
>
> Q. And what was your purpose for trying to get in touch with him?
>
> A. I thought he at least ought to be able to talk to counsel from what the paper stated he had been charged with.
>
> (Tr. 907-09).

---

* In 1976, Clark represented Hance in a divorce action. Clark performed other services for Hance of a professional nature and Hance often came to Clark's office. In fact, two weeks prior to his arrest on April 4, petitioner visited Clark to discuss a legal matter (Tr. 907).

The State did not dispute this evidence of Clark's efforts to see petitioner. Instead, the State elicited from Clark:

> I had handled his cases in the past, and I was simply trying to make the man aware of what his rights were, and be sure that he had the opportunity for counsel. (Tr. 915).

After petitioner had signed two confessions and was brought to the County Jail, on about April 7, Clark received a signed postal card from petitioner requesting that he come to see him. Clark complied (Tr. 909, 911).

The issue of Clark's efforts to see petitioner was presented at trial, but the court ruled that the jury should decide as a matter of law whether a lawyer had a legal right to see his client undergoing interrogation (Tr. 744, 894, 907-09, 1050-51, 1064-65). The matter was again raised in a motion for a new trial, where counsel argued: "[The Columbus police and the C.I.D. agents] at least had the burden to advise him that an attorney was trying to get in touch with him." (Oct. 25 Transcript at 9). The trial court, however, reiterated that Clark's efforts to see his client undergoing interrogation and the duty of the police in such a situation was a matter for the jury (id. at 22). The issue was again presented on direct appeal to the Supreme Court of Georgia and by subsequent petition for state habeas corpus relief, but was rejected by both courts (in Supreme Court of Georgia: Hance v. State, supra at 858-59, 268 S.E.2d at 344; Brief of Appellant, at 25-28; in habeas corpus court: Order, Superior Court of Butts County, ¶¶ 11-12, at 3-4; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument III, at 6-7; Petition for Writ of Habeas Corpus, ¶¶ 11-12, at 3-4).

Petitioner's Confessions

After eighteen hours of custodial interrogation, on April 5, petitioner confessed to three murders (Tr. 723-25, 780). As the questioning progressed on the second day, petitioner began making major oral admissions, saying that the "Forces of Evil" forced him to be present at the scene of the killings (Tr. 767-68). At about 1:50 P.M., petitioner began his confession. It was typed and signed by him at 3:30 P.M. (Tr. 691, 693-96, 725, 769-70). The confession described the uncontrollable anger he felt when propositioned by prostitutes. He killed them with a quick karate chop to the head, followed by repeatedly and hysterically hitting their bodies with a jack as he wept (Tr. 772-75). Petitioner described where various items involved in the murders, including a jack, tire tool, entrenching tool, and clothing, might be found. Soldiers dispatched to the identified areas found the items (Tr. 773-77, 779, 835-36, 841-42, 848, 850, 852-53, 855-57).

On or about April 5, after the confession was made, Fox learned that petitioner's family had retained a lawyer for him (Tr. 728-29, 778). Fox believed he alerted the Columbus Police Department that a lawyer was retained for petitioner, but was not sure to whom he told that fact, but it may have been to Det. Charles Rowe (Tr. 728-29). Det. Rowe, in turn, could not recall if he was advised that a lawyer had been retained for petitioner (Tr. 716).

Fox did advise Rowe that petitioner signed a confession (Tr. 718-19). The following day, on April 6, Dets. Rowe and J.M. Day went to the C.I.D., and with Fox, questioned petitioner further (Tr. 696-97, 707-08, 712-13, 720, 791). Petitioner read and waived his rights (Tr. 708-11, 792-93). At 4:15

P.M., petitioner signed another typewritten confession, again describing the death of Gail Jackson. (Tr. 716, 794, 796-802).

On April 6, petitioner also gave a handwriting exemplar to the Columbus Police Department. It was used at trial to identify petitioner as the writer of the letters from the "Forces of Evil" (Tr. 809-10, 817-18). Petitioner was then arraigned on April 6, and charged with the murder of Gail Jackson and an attempt at criminal extortion for the demand of $10,000 in one of the letters from the "Forces of Evil" (See Tr. 825). From the fingerprints petitioner gave at arraignment, a positive match was made of one fingerprint found on the back of a page of a letter from the "Forces of Evil" (Tr. 825, 829, 832).

## With No Evidentiary Hearing on Competency, Petitioner Was Permitted to Act as His Own Lead Counsel

On November 27, 1978, petitioner's motion, made against the advice of appointed counsel Richard Smith, to act as his lead counsel and handle the primary body of the trial was heard. [Transcript of Nov. 27, 1978 Hearing, at 5-6, 12 (hereinafter "Nov. Hearing")]. Richard Smith advised the court that although a State examination found that petitioner was competent to stand trial, a report of Dr. Lewis Lieberman, Ph.D., a clinical psychologist and a professor of psychology, disclosed serious doubts.

Dr. Lieberman, in his report, stated that although petitioner is "not psychotic in the usual sense . . . his thinking and emotional reactions are nevertheless clearly not normal, either." [Report of Dr. Lewis Lieberman, Ph.D., Clinical Psychologist, dated Nov. 19, 1978 (hereinafter Lieberman Report); see Order of the Superior Court of Muscogee County, Georgia

(Followill, J.) in Record on Appeal at 28-29]. Dr. Lieberman explained that petitioner suffered from a "Personality Disorder" in that "he is operating at an immature psychological level." (Lieberman Report). The report stated:

> While I have not completed all the testing I have planned, I am writing you this tentative report because my impression to date is that Mr. Hance may not be capable of assisting in an appropriate, rational way in his own defense.
>
> * * *
>
> Although it is not necessarily the case that persons with such disorders cannot help in their legal defense, in this case, it is my judgment that the problem is so severe that it does prevent him from the appropriate behavior.
>
> Mr. Hance seems to be to me extremely narcissistic and egocentric. Everything is seen only as it affects him; he seems incapable of any sort of empathy.* In addition, he is prone to daydreaming and fantasies. While (unlike the psychotic) he recognizes these fantasies as such, when they are directed towards the future, he seems incapable of estimating their probability of actually occurring. Thus, he seems to pin his hopes on his fantasies rather than realistically sizing up a situation.
>
> These tendencies manifest themselves most obviously in his expectations of his trial. He seems to view it more as an occasion for dramatic revelations than as a sober defense of his very life. I believe he wants to live, but he really doesn't seem to grasp the seriousness of his situation.

---

* Petitioner's final statement to the jury, at a hearing to determine whether the death penalty should be imposed, confirmed Dr. Lieberman's observations. When asked if he had anything to say about his position at this sentencing stage, the petitioner replied and reiterated to an astonished courtroom: "[T]his really could wreck my life and my career . . . ." (Tr. 1129, see Tr. 1149-50, 1161-62).

> His egocentrism and his fantasies prevent him from seeing his situation either from your point of view or from the point of view of prospective jurors. Without this elementary ability, how can he assist in his own defense?
>
> The characteristics of his behavior which I have been emphasizing are, of course, like those of a child and thus he is about as capable as a child would be of cooperating in a rational defense.
>
> I should also add that he himself strongly denies that he has any mental problem (as is typical of Personality Disorders) and it is very unlikely that he is malingering a Personality Disorder.
>
> (Lieberman Report, a copy of which, with the other psychological reports is contained in Appendices; emphasis supplied).

Moreover, Dr. Robert W. Wildman, the clinical psychologist who was the principal writer of the State's report finding petitioner competent to stand trial, later clarified his findings. Dr. Wildman stated that petitioner is characteristic of individuals who have

> "personality difficulties marked by long-standing feelings of inadequacy, inferiority, and insecurity. They tend not to be particularly able to think for themselves and their emotional difficulties frequently interfere with their judgment such that they often appear to lack common sense in everyday matters." (Report of Dr. Robert W. Wildman, of Central State Hospital, dated Aug. 30, 1978, authorized by Superior Court of Muscogee County in Record on Appeal at 71).

Despite these experts' reports, all inviting further study of petitioner, none was made. Petitioner, as the Lieberman report predicted, resisted further examination (Nov. Hearing at 6; Lieberman Report). Counsel then asked the court:

> [I]n view of what Mr. (sic) Lieberman has said and what they also said has been done at Central State Hospital, it seems like he is competent to make this request [and] he has requested that he be allowed to participate as [lead] counsel in this case and to handle the primary body of the proceedings. Is that correct, Mr. Hance?
>
> MR. HANCE: Yes. (Nov. Hearing at 6; emphasis supplied).

The Court then posited several questions to petitioner reminding him that he stood trial for a capital charge, that he had counsel available, and that he would be expected to abide by the court's rulings (id. at 7-12). To determine the mental competence of petitioner for self-representation, the court addressed only one question on that subject and asked it of the petitioner himself:

> THE COURT: Do you feel that you are competent to handle this case from a physical standpoint, emotional, mental standpoint?
>
> MR. HANCE: Right, sir.
>
> (Id. at 7).

No inquiry or evidentiary hearing was requested by counsel or ordered by the court to determine petitioner's mental competence to stand trial despite the petitioner's inexplicable, intense hatred of prostitutes and his uncontrollable rage at being propositioned by them which he expressed by killing them and beating their heads beyond recognition, all induced by the "Forces of Evil," and his writing six letters as the Chairman of the "Forces of Evil," which included among rambling and irrational thoughts his promise that unless an unrelated stocking strangler were caught, he would kill black women.

Even a cursory reading of these letters indicates that they are the product of an unstable mind producing uncontroll-

able and irrational behavior. The letters are reprinted in the Appendices at pages H-1 to H-51.

Petitioner's confessions to authorities also clearly reflect his sick mind. He expressed the uncontrollable rage he feels the moment a prostitute propositions him as if he expected the police to sympathize with his wild emotions. The confessions are reprinted in relevant part at pages I-1 to I-2 of the Appendices. Despite this record, the court made no inquiry as to petitioner's competency to stand trial and made only the most perfunctory inquiry on his application to act as his own lead counsel. At the trial itself, the defense of insanity was not raised.

Petitioner's Incompetence in Leading His Defense and His Failure to Communicate With Counsel

Although assistance of lawyer Richard Smith was provided to him, petitioner generally refused to confide information and trial tactics in his counsel (Nov. Hearing at 12). At both the suppression hearing and the trial, petitioner took the witness stand without telling Smith what he intended to say (Tr. 736, 927). At one point during the trial, petitioner handed the judge a single page letter and a multi-page letter that was not a motion. In the in-chambers conference that followed, it became clear that petitioner had not shown or discussed these notes with Smith (Tr. 599-601).

During the suppression hearing, attorney David Clark was not called to testify because petitioner did not tell Smith about Clark until the night following the hearing (Tr. 893). The next morning, the court denied Smith's motion to reopen the hearing, saying that the issue of right to counsel between peti-

tioner and Clark should be decided by the jury (Tr. 893-95; see Tr. 1050-51, 1064-65, where jury in closing arguments was asked as a matter of law to decide whether Clark had a right to see petitioner). The court, in denying the motion to reopen the hearing, expressly saddled Smith with petitioner's knowledge, although uncommunicated to him (Tr. 895).

Before closing arguments, at Smith's behest, petitioner's sworn statement was entered into the record, stating:

> I, WILLIAM HENRY HANCE, have decided of my own free will to handle the trial of my case by myself. Attorney Richard O. Smith has advised me of the dangers in being my own attorney. I have not advised Mr. Richard O. Smith nor his assistant, Walter F. Johnson, Jr. of what my defense is nor of the names or expected testimony of any of my witnesses that I intend to call.
>
> It was my feeling that I was competent to handle my own case.
>
> (Tr. 1034-35; the statement is in the Record on Appeal, at 20).

Following the sentencing of petitioner, the court informed the jury:

> Mr. Richard Smith and Mr. Walter Johnson are the Public Defenders of this County. Their services were made available by order of this Court. It's safe to tell you now, I think, that Mr. Hance himself has indicated to the Court both orally and in writing that he undertook to represent himself in this case, that he did not inform either of these attorneys what his defense was to be, nor did he tell them what witnesses he wanted subpoenaed, what he was going to ask them, these things came up moment by moment in court as far as what he has informed me and what these two attorneys have informed me.
>
> . . . I'm just trying to tell you that this situation existed. (Tr. 1193).

Petitioner presented his own opening statement. Despite the well corroborated confesssion, he promised to present an alibi defense: "I expect the evidence to show that I was in

the presence of another lady when the alleged crime took place." (Tr. 424). Two female witnesses were called to this effect, but neither could testify as to the petitioner's whereabouts on the date of February 28, 1978, when Gail Jackson was killed (Tr. 922, 924). The D.A., in his summation, emphasized to the jury that "[y]ou'll not hear a charge on alibi by the Court" because of the petitioner's failure to support such a defense (Tr. 1073-74).

Petitioner's cross-examination of Chief McClung, who testified extensively during his direct examination about the "Forces of Evil" and the letters he received, consisted of six non-probing questions, totalling one page (Tr. 456-57). Half of petitioner's cross-examination of Deborah Jones, who testified that she saw him with the prostitute Irene Thirkield consisted of the questions, "Did I ever treat you bad?" and "Did I ever treat you mean?," followed by two other meaningless questions (Tr. 612).

During the eight months preceding the trial, petitioner was in jail (Tr. 956, 961, 1041, 1053). Literally "keeping his own counsel," petitioner relied on only one law book in preparing his defense without assistance (Tr. 973, 1167; see also Tr. 20). That defense was further impaired by the fact that during petitioner's presentation, the court and jury often complained that they could not understand what he was saying or even hear him. (Tr. 485, 976, 986; see also Tr. 13, 30, 57).

In seeking state habeas corpus relief, petitioner argued that the court failed to inquire sua sponte as to his mental competence, but instead leaped to the conclusion that petitioner knowingly and intelligently elected to be his own

lead counsel (Memorandum in Support of Writ of Habeas Corpus, Argument IX, at 16; Amendment to Petition for Writ of Habeas Corpus, ¶ 4, at 1). The court rejected the argument, saying that by alerting the petitioner as to what self-representation legally entails, the trial court satisfied the obligation of Faretta v. California, 422 U.S. 806 (1975). (Order, Superior Court of Butts County, ¶ 4, at 13-15).

Ineffective Assistance of Counsel

Although not lead counsel, Attorney Richard Smith was able to raise defenses and objections the basis for which did not depend upon shared communications: he was expressly empowered by the court to raise evidentiary objections for petitioner (Tr. 20). He failed to raise basic and obvious points.

Despite evidence showing that petitioner killed prostitutes in a gruesome manner solely because they propositioned him, wrote letters in the persona of the "Forces of Evil," and suffered character disorders warranting further study, the defense lawyer failed to request an evidentiary hearing as to petitioner's competency to stand trial, his competency to be his own lead counsel or to raise the insanity defense for the jury's determination. Moreover, this defense would have cast doubt upon whether petitioner understood and voluntarily and intelligently waived his Miranda rights.

The question of jurisdiction, often denominated in the transcript as "venue," was an important issue in this case. If the land where the body was found belonged to the federal government, petitioner could have been tried only by the federal government, and if convicted, would have faced a maximum penalty

of life imprisonment -- not death.* To establish jurisdiction, the State presented James Webb, who served as the City Engineer of Columbus for one year (Tr. 493). One week prior to trial, Webb was taken by the District Attorney and the C.I.D. agent who found Jackson's body to the scene where the body was found (Tr. 494). By walking the distance without using any survey instruments, Mr. Webb testified that the body was found forty to fifty feet away from the Fort Benning federal military reservation (Tr. 494-95). The land where the body was found, according to Webb, formerly belonged to the federal government, but was deeded in April 1975, to the Board of Regents, University System of Georgia (Tr. 496-97). He produced a photostatic copy of the deed without authentication (Tr. 497-98).

The court found that a prima facie showing on venue had been made (Tr. 1038-39) and invited further evidence on the question (Tr. 498). Defense counsel failed to produce any such evidence.** This failure was critical. The court itself, in its subsequent ruling denying petitioner's motion for a new trial, observed that the issue of whether jurisdiction for the

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* See United States v. Kaiser, 545 F.2d 467, 469 (5th Cir. 1977) (defendant sentenced to death for a murder occuring on Fort Benning, Ga. military reservation; court reversed death sentence and imposed life imprisonment, holding that capital punishment provision in 18 U.S.C. § 1111 is unconstitutional); Habeas Transcript at 2-3.

** At the habeas corpus proceeding, the indigent petitioner asked the court for funds to hire an expert witness to determine whether the land that the body was found belonged to the federal or state government. Although petitioner's counsel argued that such a request is of constitutional dimension based on the Sixth, Eighth, and Fourteenth Amendments, the court flatly rejected the request saying: "The law is clear that the State does not have to provide those things, therefore the Court will deny the motion." (Habeas Transcript at 2-5).

crime lay in the federal government or in the State of Georgia was "so close." (Oct. 25 Transcript, at 20).

Defense counsel failed to produce any requests to charge on this or on any other issue (Tr. 1033). Thus, the court's only mention of jurisdiction or venue in its charge to the jury was a cryptic reference shrouded in the following rubric:

> I charge you that if you find and believe that at any time prior to the date this indictment was returned into this Court that the defendant did, in the County of Muscogee, State of Georgia, with malice aforethought, kill and murder the person named in the indictment, Brenda Gail Faison, and the two aliases, in the way and manner set forth in this indictment, then you would be authorized to find the defendant guilty of murder. (Tr. 1095).

After the charge was given, Smith said he had assumed the court would provide a detailed charge on venue, specifically identifying it as an issue (Tr. 1102, 1104). The court denied the request, observing that a jury could not intelligently comprehend what "venue means." (Tr. 1104).*

Decisions on who would cross-examine each witness, Mr. Smith or petitioner, appear to have been made at the last minute (see Tr. 545), reflecting minimum preparation.

During the sentencing phase of the trial, Smith simply announced to the court: "Mr. Hance has advised me that he wishes to offer no evidence in mitigation except his own testimony." (Tr. 1130).

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* As a result of counsel's failure to submit any requests to charge, the other important issues of lack of probable cause, Clark's effort to see his client during custodial interrogation, and the eighteen hour length of that interrogation, were not clearly charged by the court (see Tr. 1089-90 regarding brief definition of "voluntariness" of the confession).

The court specifically entrusted Smith to make objections on behalf of the legally untrained petitioner (Tr. 20; accord, Nov. Hearing at 9). What follows is a brief description of some of the more glaring instances where obvious objections were overlooked.

(1) At one point, the D.A. asked a witness:

> Q. Did you know that on September 3, 1968, he was indicted or charged or arrested in Lexington, Virginia, in that on the 15th day of July, 1968, he did unlawfully and feloniously and maliciously strike and wound a Shirley Humphrey with an iron pipe with intent to maim, disable, disfigure or kill the said Shirley Humphrey?
>
> A. No. (Tr. 926).

No objection was raised to the improper mention of an arrest in another jurisdiction that was also over ten years old. The question was particularly prejudicial because the petitioner in the instant case was accused of similarly using a metal instrument to kill Gail Jackson. The petitioner was thus forced to explain this 1968 arrest in his closing argument (Tr. 1041). When arguing for the imposition of the death penalty, the D.A. emphasized this prior arrest to the jury (Tr. 1144), although the court warned that only prior convictions could be introduced at the sentencing hearing (Tr. 1119). There, too, defense counsel failed to object.

(2) Many photographs of the battered prostitutes' bodies were admitted into evidence (Tr. 520, 673, 873-74, 876-77, 879-80; State's Exhs. 7-17, 29, 34, 35, 37, contained in Vol. VI of the Trial Transcript). A few of the more gruesome pictures were excluded when counsel objected. However, the D.A. was able to introduce actual corpse fragments, without any defense objection whatsoever (Tr. 538, 875). Living up to his

promise in his opening statement to present the crime in "vivid detail" (Tr. 411), the D.A. presented pieces of Gail Jackson's upper and lower jawbone with four teeth attached to each part, individual teeth, and bone fragments (Tr. 535, 538). In his closing argument, the D.A. referred to the "pieces of jawbone with teeth attached, fragments of human skull no larger than a dime, individual teeth, and you'll have that with you to take out in evidence." (Tr. 1070).

In the rulings on the admissibility of the State's various exhibits, Smith often asked petitioner if he had any objection to their admissibility (see Tr. 869, 871-72, 878, 887). Regarding the photographs, for example, Smith asked petitioner, "Do you object?" Petitioner stated, "I guess not." (Tr. 871).

(3) When petitioner testified in his own defense, the D.A. was allowed to ask him, without objection, whether he had made admissions to the doctors at the Central State Hospital (Tr. 980-81). The D.A. later called one of the examining doctors, Dr. Carl L. Smith, and asked him:

> Doctor, did you have an occasion to discuss with the defendant the offense that he is charged with here today and any other offense, and another offense? (Tr. 1014).

Defense counsel failed to object to this improper and prejudicial question and stood by silently while the court and the D.A. debated the merits of the physician-patient privilege (See Tr. 1014-15). Only after this colloquy did Smith turn to petitioner to ask whether he intended to invoke the privilege (Tr. 1015). When the court told Dr. Smith to retire from the stand outside the jury's presence, defense counsel failed to ask that a cau-

tionary instruction be given to the jury to disregard the doctor's entire testimony and especially the last offensive question. (Tr. 1026-27).

(4) When prospective juror Brenda Owens indicated that she might be prejudiced against petitioner because of his race, and she would be further biased towards the State because she attends the same church as State's witness Chief McClung and respects him, defense counsel did not move that she be excused for cause (Tr. 296-98).

(5) The prosecutor improperly shifted the burden of proof in his argument to the jury. In his opening he said that petitioner can "present any and all evidence which it has in defense of the charges" (Tr. 419). In closing, he asked why petitioner did not bring in "his preacher, his commanding officer, his fellow soldiers, his first sergeant, to testify as to his good character?" instead of the "woman that has born his illegitimate child." (Tr. 1074). No objections were raised.

(6) On cross-examination of petitioner, the prosecutor improperly forced petitioner to characterize the State's witnesses as liars (regarding Agent Fox - Tr. 966-67, 980; regarding Det. Rowe - Tr. 969, 971-72, 978; regarding Sinnie Burrell, the police stenographer - Tr. 1032). Using the characterizations, the D.A. in his summation emphasized that credibility was the critical issue in the trial (Tr. 1064, 1067, 1075) and told the jurors that petitioner was calling each of the State's witnesses "in effect, a perjurer" (Tr. 1067). Improperly bolstering his case and the veracity of the State's witnesses, the prosecutor then continued that the testimony of the State's witnesses had "the ring of truth about it" (Tr. 1067, 1076). No objections were raised to any of these instances of misconduct.

(7) The District Attorney's summations in this case was a compendium of reversible error. But defense counsel did not object. Citing his three years with the Federal Bureau of Investigation, his eight years as a prosecutor, and his community roots, the prosecutor vouched for the strength of his case and for the appropriateness of imposing the death penalty upon petitioner (Tr. 1054, 1061, 1137; see also Tr. 399-400 where D.A. cited the five and one-half years of service of his trial assistant district attorney). Referring again to "my years in law enforcement and in prosecution" (Tr. 1061), the D.A. became an unsworn witness for the State when he explained why people generally confess (id.: "So I say to you it's more of a natural process than it is an unnatural process."). The presentation of his credentials in law enforcement also added great authority when the D.A. asserted to the jury that attorney Clark had no legal right to see petitioner while he was in custody (Tr. 1065). Regarding the confession, the D.A. said "that was the 'clincher'." (Tr. 1066). No objections were raised.

The D.A. stated that petitioner, using the label of the "Forces of Evil" "snuffed out" his victim's life (Tr. 1055-56), and "prey[ed] on the fears of our community in perhaps what has been its most troubled time." (Tr. 1062-63). The D.A. stated:

> Thank God for them [the C.I.D.], I might add, and for the Columbus Police Department, too. I'll sleep better tonight and I feel that each of you will too, because of the work they did in this case as well as the fact that they are out there in other cases. (Tr. 1062).

Although noting in his summation on petitioner's guilt that the key issue is guilt or innocence, the D.A. improperly

anticipated the second sentencing phase of the trial. [Compare Tr. 1056-57 (during guilt summation: "Now specifically on the count of murder, if you do in fact, and I trust that you will because the evidence has absolutely been overwhelming, I think you all realize that . . . there will then be a second period at which time the State may introduce evidence by way of aggravation . . . ") with Tr. 1132 (during sentencing summation: "I had the advantage of knowing what the strength of the State's case was. I had the advantage of sincerely and objectively knowing the evidence, believing that we would be at this stage of the trial at some point this week.")]. No objections were taken on petitioner's behalf. Reflecting on the improper bolstering, the D.A. in his summations on guilt and sentencing used the pronoun "I" over 300 times (see Tr. 1054-77, 1131-63).

No objection was taken to the prejudicially improper remarks by the D.A. in his argument during the penalty phase of the trial. He flattered the jury, saying that when he evaluated each of its members during the voir dire he looked for courage (Tr. 1159). His chest "swelled with pride" when he heard them say at voir dire that all human life is sacred, even that of a prostitute. "I wish you could have heard [your answer] collectively." (Tr. 1141-42). On this point, he cited to his own soul searching and decision-making in recommending the death penalty (id.). While knowing the actual circumstances of petitioner's self-representation, the D.A. asserted that petitioner's act of representing himself was a standard defense tactic in death penalty cases, done to personalize him to the jury thus making it more difficult for them to vote a sentence of death (Tr. 1139-41). Of course, the D.A. was not attributing "this ploy or what have you to Mr. Smith and Mr. Johnson." (Tr. 1140). No objections were taken.

Life imprisonment would not be an acceptable alternative to death because the petitioner might escape, speculated the D.A., as he named specific local penitentiaries (Tr. 1157). In emotionally charged language, the D.A. posited that, if he received only a life sentence, the petitioner would kill prison guards and corrupt younger inmates who may be serving time only for "joy-riding" (Tr. 1157-58). "What about those prison guards that have to guard him? What about their wives and families . . . what about them, what about their families? You're going to subject those people to him for the next fifty years of his life?" (id.). No objections were raised.

The D.A. then asked the jury to unleash upon this petitioner all their anger in a "War Against Crime":

> How many times have you said to yourself as you pick up your morning newspaper or turn on your radio or television newscast, has the whole world gone crazy, when you read about a crime like this, has the whole world lost its mind? When have you said to yourself, is there an end to this somewhere, somehow? When have you said to yourself, what can I do, just one citizen, just one individual, to stop this? How many times have you said that to yourself? I've said it to myself, Lord knows how many. How many times have you said, why doesn't somebody do something?
>
> Well, it's time for somebody to do something. It's time for each and every one of you to do something. It's time for each and every one of you to act on the remarks that you've made similar to the ones that I've recounted here. It's your time. You're in the batter's box, so to speak, I don't want to make sports analogies, maybe I shouldn't say that, but it's a matter now of fish or cut bait, because we're right down to it, we're right down to it. (Tr. 1158-59).

Just as this nation was involved in World War II, the Korean War, and the Vietnam War, the D.A. continued, when "we've said,

this person is the enemy, they are trying to destroy our way of life, when you see this person, kill him," the jury is now faced with a similar enemy in a war "just as real, perhaps closer to home than any of those. It's a war against crime." (Tr. 1160). No objection was made to any of these remarks, and no objection was filed when the D.A. stated:

> I'm going to sleep well tonight, having made the recommendation to you. As a matter of fact, I'm going to sleep better and safer in my home with my family if you come back with a sentence of death. (Tr. 1155).

After forty-two minutes of deliberation, the jury returned with the death sentence. (Tr. 1181-83).

The Court's Erroneous Charge on Intent

On the element of intent, the court charged the jury that the law presumes the petitioner to be of sound mind and discretion; the acts of a person of sound mind and discretion are presumed to be the product of that person's will; and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. These presumptions, the court charged, may be rebutted. The court then instructed the jury that they could either deliberate on intent or instead expediently opt to use the presumption authorized by law, a charge which this Court has condemned [Sandstrom v. Montana, 442 U.S. 510 (1979); Tr. 1093-94, reprinted in Appendices].

Immediately after this charge, the court instructed the jury that, under Georgia law, the element of malice aforethought "shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." [Tr. 1094-95; quoting Ga. Code

§ 26-1101 (emphasis supplied); see Mullaney v. Wilber, 421 U.S. 682, 686 (1975) (similar charge struck as violative of Due Process)]. The entire charge contained only one brief reference to the presumption of innocence (Tr. 1083). No objections were made on petitioner's behalf.

The Supreme Court of Georgia observed that petitioner was effectively represented at trial (Hance v. State, supra at 865, 268 S.E.2d at 347). The issue of ineffectiveness of counsel was raised in and rejected by the state habeas corpus court (Order, Superior Court of Butts County, ¶¶ 29-30, at 9, & ¶ 1, at 10-12; Memorandum in Support of Writ of Habeas Corpus, Argument II, at 4-5; Petition for Writ of Habeas Corpus, ¶¶ 29-30, at 10-11; Amendment to Petition for Writ of Habeas Corpus, ¶ 1, at 1).*

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* The substantive omissions underlying the claim of counsel's ineffectiveness were also independently raised and preserved in the courts below (See, e.g., failure to contest jurisdiction and venue: Hance v. State, supra at 858, 268 S.E.2d at 343-44; Order, Superior Court of Butts County, ¶¶ 23-24, at 7; Petition for Writ of Habeas Corpus, ¶¶ 23-24, at 8-9; Oct. 25 Transcript at 9-11, 20-21; trial court's patently erroneous charges on intent: Order, Superior Court of Butts County, ¶¶ 21-22, at 5-7; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument V, at 9-10; Petition for Writ of Habeas Corpus, ¶¶ 21-22, at 7-8; introduction of actual corpse fragments -- Order, Superior Court of Butts County, ¶¶ 15-16, at 5, Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument IV, at 8; Petition for Writ of Habeas Corpus, ¶¶ 15-16, at 5-6; inflammatory, prejudicial argument by prosecutor: Order, Superior Court of Butts County, ¶¶ 27-28 at 8-9; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument VI, at 11-12; Petition for Writ of Habeas Corpus, ¶¶ 27-28 at 9-10; use at trial of an over ten year old arrest in another jurisdiction on similar facts -- Hance v. State, supra at 865-66; 268 S.E.2d at 348; Order, Superior Court of Butts County, ¶¶ 17-18, at 5; Petition for Writ of Habeas Corpus, ¶¶ 17-18, at 6-7; failure to call witnesses at death penalty hearing -- Order, Superior Court of Butts County, ¶¶ 29-30, at 9; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument II, at 4; Petition for Writ of Habeas Corpus, ¶¶ 29-30, at 10-11; Amendment to Petition for Writ of Habeas Corpus, ¶ 1, at 1; see Habeas Transcript at 3-5, where court ruled that indigent petitioner was not entitled to payment of expenses for witnesses to testify in mitigation of death penalty).

## The Court Barred Any Evidence of Petitioner's Mental State Offered in Mitigation at Death Penalty Hearing

During the sentencing phase of the trial, after a verdict of guilt was returned, defense counsel attempted to present in mitigation the petitioner's mental state at the time of the commission of the crime and at trial so that the sentence-imposing jury could "understand what goes into his mind and what kind of person he is." (Tr. 1125). The court sustained the D.A.'s objection and barred this line of inquiry entirely.

Counsel began: "You told us just yesterday that you didn't kill these girls." Petitioner responded: "I didn't." (Tr. 1124). When the District Attorney objected, Smith explained:

> MR. R. SMITH: Your Honor, my position, of course, at this hearing is that the question of whether or not he killed the girls has been decided by the jury, and I'm not asking that question for purposes of trying to raise the question in the juror's minds at this point. But, I think it's significant to get into his thoughts and thought processes on the question in terms of mitigation for the jury to understand what goes into his mind and what kind of person he is. (Tr. 1125).

Counsel then continued the questioning of petitioner (Tr. 1126-27), but the D.A. then again objected to any introduction of petitioner's state of mind:

> MR. W. SMITH [DISTRICT ATTORNEY]: Your Honor, this is trying to imply some kind of mental issue in the trial which has not been raised by any competent evidence whatsoever during the course of the trial, not been in issue at this trial.
>
> MR. R. SMITH: Your Honor, the defendant's state of mind at the time of the trial and the time of the commission of the crime, all those things are to be considered in this stage of the trial.

> THE COURT: I believe the District Attorney's point is well taken. I'll overrule, I'll sustain his objection and direct you not to follow along the line of questioning that you have just outlined. (Tr. 1127-28).

The jury returned a sentence of death (Tr. 1181-83), and the court ordered that petitioner be electrocuted in conformity with such recommendation (Tr. 1190-91).

The issue of the patently erroneous order of the trial court barring any evidence of defendant's mental state at either the time of the homicides or during the trial was raised and preserved in the courts below (Tr. 1124-28; Petitioner's Memorandum in Support of Writ of Habeas Corpus, Argument VII, at 13; Petition for Writ of Habeas Corpus, ¶¶ 25-26, at 9). On habeas corpus review, the state court upheld the exclusion of such evidence saying that it "was irrelevant in the sentencing phase . . ." (Order, Superior Court of Butts County, ¶¶ 25-26, at 8).

## ARGUMENT

### POINT I

### WHERE THE GEORGIA COURTS AND U.S. MILITARY COURTS HAVE REACHED CONTRARY CONCLUSIONS ON THE SAME FACTS AS TO THE LEGALITY OF PETITIONER'S ARREST AND WHETHER HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS WERE VIOLATED, THIS COURT SHOULD RESOLVE THE CONFLICT

Two courts reviewing the identical facts reached different conclusions on the legality of petitioner's arrest and the admissibility of the confession and other evidence that directly resulted from the arrest. A unanimous U.S. Army Court of Military Review held that the arrest was not based on probable cause, that the taint of the illegality was not dissipated, and that the confessions and other evidence discovered as a result

thereof must be excluded.* United States v. Hance, 10 M.J. 622 (1980). The Supreme Court of Georgia and a Georgia Superior Court hearing a writ of habeas corpus found probable cause. Unless this Court resolves this conflict now, petitioner may be foreclosed from ever again raising the Fourth Amendment issue. See Stone v. Powell, 428 U.S. 465 (1975).

In finding probable cause, the Georgia courts have departed from the rules set down by this Court. See Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975). Moreover, in this case this Court may clarify the Fourth Amendment's application to a prolonged custodial interrogation.

The Fourth Amendment dictates that an arrest must be predicated on probable cause. Brown v. Illinois, supra. Probable cause exists when a person of reasonable caution would be justified in believing that the individual to be arrested has committed a crime. See Wong Sun v. United States, 371 U.S. 471, 479 (1963). Probable cause is necessary when police restrain an individual in a manner that is so intrusive as to be "tantamount" to an arrest. Dunaway v. New York, supra at 212-16.

From the circumstances surrounding the telephone calls and the letters from the "Forces of Evil," C.I.D. agents believed that the perpetrator in the present case was a black male soldier.

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* The federal military appellate court remanded the case for a rehearing on probable cause in light of the Government's belated allegation that, immediately prior to his arrest, petitioner's voice had been identified from a tape-recorded telephone conversation. This identification, however, turned out to be a hearsay description of an uncertain comment by two of petitioner's military superiors that they "felt" it was petitioner's voice, but could not say so with certainty, and the military decided not to proceed further with the prosecution. Moreover, this additional evidence was not credited by the state habeas corpus court which chose instead to rely on the prior assessment of probable cause made by the Supreme Court of Georgia without the voice identification. See Statement of the Case at pages 6 - 9, supra.

Agent Fox also received information from "a girl named 'Peaches'" that petitioner, a black male soldier, had given Irene Thirkield, one of the deceased prostitutes, a ride to a local bar (Tr. 697-98, 727-28). On this information, the Supreme Court of Georgia held that probable cause existed to arrest petitioner for murder. Hance v. State, 245 Ga. 856, 864, 268 S.E.2d 339, 347 (1980).

This decision is not tenable. The fact that a soldier is seen with a woman at a local bar near a military reservation hardly amounts to probable cause.

In addition, the State may now belatedly contend that the fact that petitioner's commanding officer and first sergeant made a tentative identification of petitioner's voice from a tape-recording of a telephone call supports a determination of probable cause. But of the two arresting officers, Agent Fox admitted that he knew nothing about the tape-recording or the identification before he arrested petitioner (Habeas Transcript at 46-47, 51). The other officer, Agent Besson, knew about the uncertain identification of a telephone recording but testified that he did not believe there was probable cause to arrest the petitioner when he and Agent Fox did so on April 4 (United States v. Hance, 10 M.J. at 625 n.5).

Concerned by the flimsy evidence used to arrest petitioner, the state habeas corpus court stated: "Well, I didn't understand why you and Mr. Fox thought Mr. Hance had anything to do with it" (Habeas Transcript at 23; accord, id. at 43-44). The court made no findings as to the additional proffer of the uncertain telephone recording identification; it simply cited the Georgia Supreme Court's prior opinion and found that the arrest was based on probable cause because of Peaches's information, and the fact that petitioner had been given the warnings

required by Miranda v. Arizona, 384 U.S. 436 (1966). Order, Superior Court of Butts County, entered July 29, 1981, ¶¶ 7-8, at 2, & ¶ 2, at 12 (contained in Appendices). Following this order, the Georgia Supreme Court issued a certificate denying review of the dismissal of the habeas corpus petition.

The arrest was designed to produce incriminating statements, as in Dunaway and Brown. The agents testified that "we decided to talk to him" because petitioner had become the focus of their investigation and such talks might be "productive" (Habeas Transcript at 24, 30, 38, 41). Agent Fox admitted that had the interrogation not been successful, he would have had to send petitioner back to his unit and to search for more evidence specifically "to tie him into it." (Id. at 42-43, 48-49).

The other circumstances indicate petitioner's arrest was made in a manner purposefully calculated and effected "to cause surprise, fright, and confusion." Brown, 422 U.S. at 605. The agents telephoned petitioner's commanding officer to say they were coming to get petitioner (Tr. 678-80, 751). Petitioner was ordered to his superior's office. Petitioner had no options; he had to obey (Habeas Transcript at 26; Tr. 680, 751). Petitioner was not questioned briefly where he was found. Instead, he was taken from his unit and placed in a C.I.D. car, where he was told not to make any statements yet about the deceased women, transported to C.I.D. headquarters, and placed in an isolated interrogation room (Habeas Transcript at 26, 38-39; Tr. 680, 751, 785-86, 992). He was not free to leave at any time thereafter (Habeas Transcript at 25, 39-41, 45; Tr. 688). His freedom to move was limited to "get[ting] up" occasionally from his interrogation chair (Tr. 782) "[j]ust for him being allowed to go to the latrine, and that was it." (Tr. 766; emphasis supplied).

See Dunaway v. New York, supra at 212. Both the U.S. Army Court of Military Review and the Supreme Court of Georgia found that petitioner was under arrest. United States v. Hance, supra at 624-25; Hance v. State, supra at 863-64, 268 S.E.2d at 347.*

There remains the question of whether the connection between this unconstitutional police conduct and the evidence discovered as a result thereof obtained during petitioner's illegal detention was nevertheless sufficiently attenuated to permit its use at trial. See Rawlings v. Kentucky, 448 U.S. 98, 106-07 (1980); Dunaway v. New York, supra at 216; Wong Sun v. United States, supra at 487-88; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

In determining whether a confession is obtained by the exploitation of an illegal arrest, this Court has identified several factors to be considered: the Miranda warnings, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. "And the burden of showing admissibility rests, of course, on the prosecution." Brown v. Illinois, supra at 603-04; accord, Rawlings v. Kentucky, supra; Dunaway v. New York, supra at 218.

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* In the appellate proceedings of both the state and federal military trials, the retroactivity of Dunaway v. New York, supra, was raised. The Georgia Supreme Court did not comment on the question, and the U.S. Army Court of Military Review stated that the issue is not present in this case because "[t]he basic principles announced in Wong Sun and Brown remain unchanged in Dunaway and are controlling here." United States v. Hance, supra at 627 n.12. At least one federal court and one state court of last resort have disagreed on Dunaway's retroactivity. Compare United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979) (Dunaway should be applied retroactively) with State v. Deputy, 433 A.2d 1040 (Del. 1981).

The State's proof on the Miranda warnings was limited solely to testimony that, when petitioner was advised of those rights prior to his statements and asked whether he understood and wished to waive them, he responded affirmatively. But petitioner's mental condition, as described herein, casts grave doubt upon whether petitioner could validly waive his Miranda rights. The trial court should have considered whether petitioner's mental condition "may have deprived him of his freedom of choice, the essence of his ability to make a voluntary confession." Eisen v. Picard, 452 F.2d 860, 863-64 (1st Cir. 1971), cert. denied, 406 U.S. 950 (1972); accord, Blackburn v. Alabama, 361 U.S. 199 (1960).

At any rate, Brown v. Illinois, supra at 601, settled that "[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth," and held therefore that "Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation." Accord, Dunaway v. New York, supra at 216-17. "Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains." Brown v. Illinois, supra at 601-02; accord, Dunaway v. New York, supra at 217.

The factor of temporal proximity contemplates that the passage of time between the arrest and the confession may diminish the probability that the confession is tainted. In the instant case, the petitioner made some incriminating statements on the first day but did not confess until the second day after prolonged interrogation. On the question of the proximity of the confession, the federal military appellate court reasoned:

> Moreover, a significant passage of time, depending on the circumstances, can increase rather than diminish the likelihood of a tainted confession. As Justice Stevens noted in his concurring opinion in Dunaway v. New York, 442 U.S. at 220:
>
> > The temporal relationship between the arrest and the confession may be an ambiguous factor. If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest rather than a short one.
>
> In this case the apprehension was exploited in that the interrogation was prolonged and the appellant was not free to leave. Indeed, he was confined to bachelor enlisted quarters for two nights.

United States v. Hance, supra at 627.

The purpose and flagrancy of the police action is another significant factor. First, the arrest here was investigatory in nature, a significant consideration in Brown. 422 U.S. at 605. Second, the manner of the arrest was calculated to provoke "surprise, fright, and confusion," another important factor in Brown. Id. Finally, petitioner was not free to go, was not told that his attorney had inquired about him, and the police deliberately misinformed petitioner's lawyer as to his client's whereabouts.

The U.S. Army Court of Military Review correctly concluded:

> In the instant case, there were no significant intervening circumstances which would attenuate the taint. To the contrary, as noted, the taint was exploited by the prolonged interrogation and the irregular confinement of appellant.
>
> The Government has failed to establish the legality of the appellant's apprehension and has not demonstrated that this taint was dissipated. The resulting confessions and other derivative evidence therefore were inadmissible.

United States v. Hance, supra at 627 (footnote reference omitted).

Petitioner respectfully requests that this Court grant a writ of certiorari to examine the conflict between the federal and state appellate courts on whether this death-sentenced petitioner's Fourth Amendment rights were violated. The state court's determination of petitioner's federal rights conflicts squarely with this Court's applicable decisions. This case also presents the effect of a prolonged interrogation in exacting confessions when the arrest was not based on probable cause.

## POINT II

### A CONFESSION TAKEN FROM A DEFENDANT WHO IS NOT TOLD BY LAW ENFORCEMENT OFFICIALS BEFORE CONFESSING THAT HIS LAWYER TRIED TO SEE HIM BUT WAS UNSUCCESSFUL BECAUSE THEY LIED TO HIS ATTORNEY SHOULD BE EXCLUDED PURSUANT TO THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS

Where an attorney repeatedly attempts to communicate with his client who is being interrogated, and where law enforcement officials lie to the attorney and do not inform the accused of his lawyer's inquiries, should an ensuing confession be suppressed? This is a constitutional issue which this Court has never resolved. State courts are in conflict as to the constitutional requirements in such cases.

In Escobedo v. Illinois, 378 U.S. 478 (1964), this Court announced that a "'confession taken from a defendant, during a period of detention [prior to indictment], after his attorney had requested and been denied access to him' could not be used against him in a criminal trial." Id. at 486-87 (brackets in original), quoting with approval People v. Donovan, 13 N.Y.2d 148, 151, 243 N.Y.S.2d 841, 842, 193 N.E.2d 628, 629 (1963). In the facts of Escobedo, however, while the attorney was asking to see his client, the client was at the same time

asking to see his attorney.

State courts do not agree as to what is required of police officials when a lawyer demands to see his client, but the client undergoing custodial interrogation has waived his Miranda rights. The Supreme Court of Louisiana, for example, in State v. Jackson, 303 So.2d 734 (1974), stated that governmental authorities cannot deny a retained lawyer reasonable access to his client. Id. at 737. A waiver of the right to the assistance of counsel and to remain silent is never informed, the court stated, unless the officials advise the accused that a lawyer had called for him, had stated that he had been retained to represent him, and had asked that he not be interrogated until the lawyer could confer with him. Id. The Supreme Court of Nebraska and the Supreme Judicial Court of Massachusetts agree. State v. Johns, 185 Neb. 590, 177 N.W.2d 580 (1970); Commonwealth v. McKenna, 355 Mass. 313, 244 N.E.2d 560 (1969). In McKenna, the court held that Escobedo requires that when an attorney identifies himself to police and states that he wants to be with his client, the police have the immediate duty to so inform the accused. 355 Mass. at 324, 244 N.E.2d at 566. An individual undergoing custodial interrogation is "entitled to know of his counsel's availability and, with that knowledge, to make the choice [to go on with the interrogation] with intelligence and understanding." Id. Absent that knowledge, any waiver that may have been made "became then inoperative." Id.

In direct conflict, the Supreme Court of Pennsylvania has held that police have no obligation to inform an accused of his lawyer's availability, and that an ensuing confession is admissible even though police lied to the lawyer. Commonwealth v. Yates, 467 Pa. 362, 357 A.2d 134 (1976). In the present

case, the Supreme Court of Georgia and the Georgia Superior Court also found no constitutional violation. See Statement of the Case at page 14, supra. To resolve this conflict and to settle this question, petitioner respectfully requests that this Court grant a writ of certiorari.

In Miranda v. Arizona, 384 U.S. 436 (1966), this Court stated that the Constitution demands adherence to a higher standard than was applied in the present case:

> "The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake. See People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963) (Fuld, J.)." 384 U.S. at 465 n.35.

There is further substantial support for a rule requiring the police to allow counsel prompt access to his client upon request. The American Law Institute's Model Penal Code of Pre-Arraignment Procedure § 140.7 (1975) provides:

> An attorney undertaking to act as counsel for an arrested person shall have prompt access to such person, by telephone, and in person on counsel's arrival at any place where such person is detained. . . .

Here, the evidence is uncontroverted. The police gave petitioner's counsel false information in order to delay or frustrate petitioner's access to counsel. Petitioner was kept incommunicado for a three day period [see Darwin v. Connecticut, 391 U.S. 346, 349 (1968)] and interrogated constantly by relays of police officers [see Harris v. South Carolina, 338 U.S. 68, 69-70

(1948)] until he confessed (Tr. 680-81, 685, 687, 723, 732, 737, 755, 780, 785, 787, 930-31; Habeas Transcript at 29). The interrogation room "was secured and we had a sign out 'Do Not Enter, Interview in Progress.'" (Tr. 785). As this Court observed in Escobedo, once a confession is extracted, the trial becomes no more than an appeal from the interrogation, and a defendant's right to counsel becomes a mere formality. Escobedo v. Illinois, supra at 487-88.

Moreover, the State must establish by a preponderance of the evidence that petitioner's waiver of his right to counsel was voluntary, knowing, and intelligent. See Lego v. Twomey, 404 U.S. 477, 489 (1972); Miranda v. Arizona, supra at 444 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The only evidence of such a waiver in this record are the one word answers given by petitioner while restrained in the interrogation room. When petitioner's attorney was denied access to him, and petitioner was not informed of his attorney's availability, "one word answers are insufficient to establish a valid waiver." Commonwealth v. Yates, supra at 370, 357 A.2d at 138 (dissenting opinion).

To determine whether a confession obtained by these police tactics should be suppressed, petitioner respectfully requests this Court to grant a writ of certiorari.

## POINT III

## DESPITE STRONG EVIDENCE OF MENTAL IMBALANCE, THE COURT FAILED TO INQUIRE AS TO PETITIONER'S COMPETENCE TO STAND TRIAL, OR TO QUESTION HIS DEMAND TO BE HIS OWN LEAD COUNSEL, ALL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS

In Pate v. Robinson, 383 U.S. 375 (1966), this Court held that when there is evidence raising a bona fide doubt as to the defendant's competence to stand trial, the accused is

constitutionally entitled to a hearing on the issue of his capacity to proceed. Even if the parties fail to bring the issue to the court's attention by appropriate motion, the court is obligated to act sua sponte. 383 U.S. at 385. However, as one perplexed Court of Appeals observed this year: "The Supreme Court has not attempted to promulgate a standard describing the quantum of doubt that must exist before a trial judge is required to hold a Pate hearing." Acosta v. Turner, 666 F.2d 949, 954 (5th Cir. 1982).

This case presents the Court with an opportunity to address the issue of what quantum of doubt must exist before a trial judge is required to hold a Pate hearing. The Court of Appeals for the Fifth Circuit, surveying its own decisions on the applicable standard, found them to be inconsistent. Acosta v. Turner, supra at 954 (standards for level of doubt range from "substantial" to "real, substantial, and legitimate doubt" to evidence sufficient to "clearly and unequivocally create reasonable doubt") (citing cases). In sum, "no single phrase has yet evolved that captures all the nuances of Pate . . ." Id.

The Ninth Circuit has recently confessed that it is troubled by the question of whether a defendant whose competence is in question may make certain kinds of decisions, but not others. Chavez v. United States, 656 F.2d 512, 518-19 (1981).

Pate declared that federal constitutional law, rather than state law, governs a defendant's right to a hearing on his competence to stand trial. The import of Pate is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required on the issue of fitness to proceed. Drope v. Missouri, 420 U.S.

162, 180 (1975). See also Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam). In the present case, the court failed to conduct any inquiry at all on defendant's mental competence to proceed. The issues presented here then are whether the Georgia courts failed to apply the law as prescribed in Pate and Drope and whether there were facts and evidence present that raised a bona fide doubt as to petitioner's competence, entitling him to a hearing.

This is not a case where the trial judge was asked to be a psychiatrist. Three weeks before the trial, substantial evidence suggested petitioner's mental incompetence. The letters from the "Forces of Evil" were replete with ravings, petitioner's incriminating statements leading to a confession further recited that the "Forces of Evil" propelled him to kill prostitutes, and the gruesome manner in which the prostitutes were slaughtered reveals a wholly abnormal, depraved mind. In addition, the court was informed that a clinical psychologist's report plainly stated that petitioner's character disorders deserved further study to determine competency (Nov. Hearing at 5-6).* Ignoring all these facts, the trial judge failed to make any inquiry on petitioner's mental fitness to stand trial.

At the same hearing, petitioner stated that he would not share any trial tactics or information with defense counsel

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* In denying habeas corpus relief, the Superior Court of Butts County stated that petitioner was examined by a psychologist "pursuant to the granting of counsel's motion [who] found petitioner competent." Order, Superior Court of Butts County, supra at 11. This statement by the habeas court is simply wrong. The defense psychologist report clearly stated:

> ". . . my impression to date is that Mr. Hance may not be capable of assisting in an appropriate, rational way in his own defense." Lieberman Report.

(Nov. Hearing at 12). Still, the court failed to make any inquiry on the petitioner's competence.

Wholly apart from its failure to hold a hearing on petitioner's competency to proceed, the court erred in not conducting a meaningful inquiry on petitioner's decision to act as his own lead counsel. In Westbrook v. Arizona, 384 U.S. 150, 150 (1966) (per curiam), this Court stated:

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused -- whose life or liberty is at stake -- is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 465; Carnley v. Cochran, 369 U.S. 506.

In the present case, the Court conducted a simple pro forma colloquy with the accused about his demand for self-representation (Nov. Hearing at 7-12). But in Pate, whose intervening decision was the basis for the remand in Westbrook, 384 U.S. at 151, this Court plainly held that a trial court may not dispense with an evidentiary hearing simply because a defendant displays mental alertness and understanding in "colloquies" with the trial judge. Pate v. Robinson, supra at 385.*

---

* The court here addressed only one question on mental competence and asked it of the petitioner himself:

(Footnote continued on page 49)

Moreover, although the state's psychologist concluded that petitioner was competent to stand trial, it gave no opinion regarding his competency to represent himself. Indeed, he stated that individuals with petitioner's "personality difficulties . . . tend not to be particularly able to think for themselves, and their emotional difficulties frequently interfere with their judgment such that they often appear to lack common sense in everyday matters." (Report of Dr. Robert W. Wildman, quoted in Statement of the Case, at page 18, supra). The trial court failed to fulfill its "protecting duty," under Johnson v. Zerbst, supra, and Westbrook v. Arizona, supra at 150-51, by not inquiring further as to petitioner's mental competence to elect to be his own lead counsel.*

The state habeas corpus court held that counsel was not ineffective in not moving for an evaluation to determine com-

---

(Footnote continued from page 48)

THE COURT: Do you feel that you are competent to handle this case from a physical standpoint, emotional, mental standpoint?

MR. HANCE: Right, sir. (Nov. Hearing at 7).

* Dr. Lieberman's forecast of the trial (Statement of the Case, at pages 16-18, supra) was absolutely accurate. As predicted, petitioner denied having any mental problems (Nov. Hearing at 7), lived up fully to his avowed intention not to share confidences with his trial counsel (Nov. Hearing at 12; Tr. 599-601, 736, 893-95, 927, 1034-35, 1193; Oct. 25 Transcript at 3; Record on Appeal at 20), conceived of the trial as an occasion for dramatic revelations by announcing a surprise alibi defense which was totally unsupported (Tr. 424), and viewed everything with extreme narcissism and egocentrism (Tr. 1129; see Tr. 1149-50, 1161-62). At the hearing to determine whether the death penalty should be imposed, when asked if he had any comment to make to the jury at this sentencing stage, petitioner replied and reiterated: "[T]his really could wreck my life and my career . . . ." (Tr. 1129, see Tr. 1149-50, 1161-62).

petency, and that the trial court adequately complied with the procedure set out in Faretta v. California, 422 U.S. 806 (1975), before granting petitioner's demand for self-representation. Order, Superior Court of Butts County, ¶ 1, at 10-11, & ¶ 4, at 13-15, addressing Memorandum in Support of Writ of Habeas Corpus, at 9, and Amendment to Petition for Writ of Habeas Corpus, ¶¶ 1 & 4. Petitioner respectfully requests this Court to grant a writ of certiorari to review the constitutional questions involving mental competence in this capital case and to review the application of this Court's decisions by the Georgia courts.

## POINT IV

## IN A CAPITAL CASE, PETITIONER WAS GIVEN THE HELP OF COUNSEL WHOSE LEVEL OF PERFORMANCE FELL CRITICALLY BELOW EFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

Fifty years ago this Court ruled that the right to be heard by counsel is fundamental to a fair trial. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). This right means more than simply counsel's presence -- a person accused of a crime is entitled to the "effective assistance of counsel." See, e.g., McMann v. Richardson, 397 U.S. 759, 771 (1970) ("defendants facing felony charges are entitled to the effective assistance of competent counsel"); Anders v. California, 386 U.S. 738, 744 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963).

This Court, however, has never expounded upon the minimum level of competence necessary to satisfy the requirement of the Sixth Amendment. In the absence of a standard fixed by this Court on this "question of fundamental importance to the administration of criminal justice in both the state and federal courts," Maryland v. Marzullo, 435 U.S. 1011 (1978) denying cert.

to 561 F.2d 540 (4th Cir. 1977) (White and Rehnquist, JJ., dissenting), the federal courts have adopted disparate standards for testing the effectiveness of counsel. The First and Fourth Circuits require that defense counsel render "reasonably competent assistance," "within the range of competence expected of attorneys in criminal cases." United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978). Five Circuits deem representation to be adequate if "reasonably effective assistance" was rendered. Eldridge v. Atkins, 665 F.2d 228, 231 (8th Cir. 1981) ("exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances"); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (reasonably competent and skillful manner), cert. denied, 445 U.S. 945 (1980); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) ("counsel reasonably likely to render and rendering reasonably effective assistance"); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973) ("reasonably competent assistance of an attorney acting as [defendant's] diligent conscientious advocate"), after remand aff'd en banc, 624 F.2d 196 (D.C. Cir. 1979); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960) ("counsel reasonably likely to render and rendering reasonably effective assistance") (emphasis in original), cert. denied, 368 U.S. 877 (1961). The Ninth Circuit requires reasonable competence and a further showing of actual prejudice. United States v. Donn, 661 F.2d 820, 824 (1981). The Third Circuit requires of defense counsel the "exercise of the customary skill and knowledge which normally prevails at the time and place." United States ex rel. Johnson v. Johnson, 531 F.2d 169, 174 (3d Cir.), cert. denied, 425 U.S. 997 (1976). The Seventh Circuit employs yet another

standard, that the Constitution guarantees a criminal defendant only "a minimum standard of professional representation." United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), cert. denied, 423 U.S. 876 (1975). The Second Circuit, now standing alone, continues to apply the strict standard that defense counsel's performance must be not "of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." Twitty v. Smith, 614 F.2d 325, 333 (2d Cir. 1979), quoting United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

That divergent standards are applied by the courts to measure so fundamental a right as that of an accused to be heard by counsel is alone reason for this Court to accept the present opportunity to enunciate the appropriate standard to be employed. Additionally, the present petition strikingly demonstrates the even more pressing need for this Court to promulgate minimum standards of performance in a capital case to which the courts can look for guidance in assessing whether a defendant has been afforded his constitutional right to the effective assistance of counsel.

In the present case, the performance of appointed co-counsel is most shocking. As set forth in detail above (Statement of the Case, at pages 23-33, supra), despite the facts of this case, counsel failed to raise any challenge before trial to the legality of petitioner's arrest, failed to move for further psychiatric evaluation or hearings to determine petitioner's mental competence to stand trial or to act as his own lead counsel, failed to present a defense of insanity, and failed to object to the admission of inflammatory evidence such as actual corpse fragments and an over ten year old arrest of petitioner, and to

other instances of egregious prosecutorial misconduct and to the court's patently erroneous charges on intent.

Moreover, defense counsel failed to adequately pursue the question of jurisdiction which the court invited him to contest on a question it considered "so close" on whether jurisdiction for the homicide of Gail Jackson lay in the federal or state courts.

Yet, despite such overwhelming evidence of incompetence, the state habeas corpus court below determined that counsel's performance "easily [met]" the governing standard of "counsel reasonably likely to render and rendering reasonably effective assistance." Order, Superior Court of Butts County, supra at 12, citing MacKenna v. Ellis, supra, and Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974).

This deprivation of petitioner's Sixth Amendment rights requires the attention of this Court of last resort; "in the last analysis, it is this Court's responsibility to determine what level of competence satisfies the constitutional imperative." Maryland v. Marzullo, 435 U.S. at 1012.

## POINT V

## THE ORDER OF THE COURT ABSOLUTELY BARRING EVIDENCE OF PETITIONER'S MENTAL STATE OFFERED IN MITIGATION AT A DEATH PENALTY HEARING VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS

At the sentencing phase of the trial, where the jury was to consider recommending the death penalty, the court absolutely barred defense counsel from introducing any evidence of petitioner's mental state in mitigation of such penalty. See Statement of the Case, at pages 34 - 35, supra. At the habeas corpus hearing, the state court upheld the exclusion of such

evidence saying that it "was irrelevant in the sentencing phase . . . ." Order, Superior Court of Butts County, entered July 29, 1981, ¶¶ 25-26, at 8, certificate of probable cause to appeal denied (Ga. Sup. Ct. Oct. 9, 1981).

In January, 1982, this Court ruled that the Oklahoma courts had erred in failing to take a young offender's disturbed emotional state and deprived family background into account as mitigating factors in the decision to impose the death penalty. Eddings v. Oklahoma, ____ U.S. ____, 102 S. Ct. 869 (1982). The Court stated that the Eighth Amendment, as interpreted in Lockett v. Ohio, 438 U.S. 586 (1978), requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor . . . ." Eddings v. Oklahoma, supra, 102 S. Ct. at 875. See also Gregg v. Georgia, 428 U.S. 153, 197 (1976) (plurality opinion) ("[T]he jury's attention is directed to the characteristics of the person who committed the crime: . . . Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., . . . his emotional state at the time of the crime)," quoted with approval in Eddings, supra, 102 S. Ct. at 874 n.6.

The record here reveals that at the sentencing phase, defense counsel tried to present evidence of petitioner's disturbed mental and emotional state both at the time of the crime and during the trial (Tr. 1125, 1127-28). Defense counsel stated at the sentencing hearing:

> Your Honor, the defendant's state of mind at the time of the trial and the time of the commission of the crime, all those things are to be considered in this stage of the trial (Tr. 1127-28).

Unpersuaded, the trial judge barred the presentation of any evidence on defendant's mental state at a sentencing hearing where

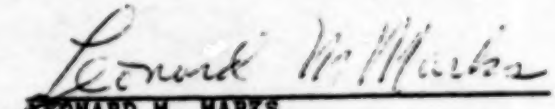
the jury was being asked to recommend the death penalty (id.). The court's patently erroneous order violated the petitioner's Eighth Amendment rights as delineated by this Court in Eddings v. Oklahoma, supra.

The instant case presents the question of whether the recent holding in Eddings, where the trial judge alone weighed the evidence of aggravating and mitigating circumstances, applies equally to a case where a jury must decide whether to impose the death penalty, and the judge bars the presentation of mitigating circumstances.* To consider the application of Eddings to a jury trial, petitioner respectfully requests this Court to grant a writ of certiorari. In the alternative, petitioner respectfully requests that this Court summarily grant this petition for a writ of certiorari and remand the case in light of Eddings.

## CONCLUSION

Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,



LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

---

* The issue also entails consideration of whether a new sentencing hearing or new trial is the appropriate remedy since the original sentencing jury has been discharged.

MARTIN R. GOLD
HOWARD L. WIEDER
PAUL V. LiCALSI
JANE G. STEVENS
595 Madison Avenue
New York, New York 10022

Attorneys for Petitioner

Dated: March 8, 1982
New York, New York

## CERTIFICATE OF SERVICE

I, LEONARD M. MARKS, a Member of the Bar of the Supreme Court of the United States and Counsel of Record for the Petitioner, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Petition for Writ of Certiorari with Volumes I and II of Appendices to the Petition upon the Respondents by depositing a copy of same in the United States Mail, with first-class postage prepaid, with proper address to:

Hon. Michael Bowers
State Law Department
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Att'n: Mary Beth Westmoreland, Esq.

Hon. William J. Smith
District Attorney
Post Office Box 1340
Government Center
Columbus, Georgia 31902

I further certify that in accordance with the Rules of this Court, all parties required to be served have been served. This 8th day of March, 1982.

Leonard M. Marks

LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

RECEIVED
MAR 10 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

No. 81-6352

(No. A - )

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

---

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

---

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY,
STATE OF GEORGIA

---

MOTION TO PROCEED
IN FORMA PAUPERIS

The petitioner, William Henry Hance, by his undersigned counsel, requests leave to file the enclosed petition for a writ of certiorari to the Superior Court of Butts County, State of Georgia without prepayment of fees and costs or the giving of security therefor and to proceed in forma pauperis pursuant to Rule 46 of the Supreme Court of the United States. The affidavits of petitioner and of undersigned counsel are attached in support of the motion. Leave to proceed in forma pauperis was sought in the Superior Court of Butts County, State of Georgia, and such leave was granted.

LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

No. 81 -

(No. A - )

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

---

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

---

**AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS ON PETITION FOR WRIT OF CERTIORARI**

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

LEONARD M. MARKS, being duly sworn, deposes and says:

1. I am the counsel of record for William Henry Hance, the petitioner in the above-captioned action, who requests leave to file the enclosed petition for a writ of certiorari to the Superior Court of Butts County, State of Georgia, without prepayment of fees and costs or the giving of security therefor and to proceed in forma pauperis. I make this affidavit in support of the motion.

2. The affidavit of the petitioner himself, William Henry Hance, sworn to on February 23, 1982, is annexed hereto in support of the motion. As his affidavit attests, petitioner

is in poverty and is unable to prepay the fees and costs for the filing of the instant petition or to give security therefor. I believe that he is in poverty, owns no real or personal property, receives no income from earnings, is unable to prepay the fees and costs for the filing of the petition, or to give security therefor, and qualifies for in forma pauperis relief. The petitioner is incarcerated in the Georgia Diagnostic & Classification Center in Jackson, Georgia, awaiting execution.

3. Because of his poverty, the petitioner has never been able to pay for counsel or any court fees throughout the proceedings in the Georgia courts. At trial, the court appointed lawyers from the Office of the Public Defender of Muscogee County, Georgia, to sit with him. On a motion for a new trial and direct appeal, the court appointed the same lawyers to represent him. On state habeas corpus relief, he was represented by volunteer counsel, and the Superior Court of Butts County, State of Georgia, permitted petitioner to file the state habeas corpus petition without prepayment of costs and to proceed in forma pauperis.

4. I, as Counsel of Record, and the other attorneys for petitioner listed on the petition for a writ of certiorari are undertaking petitioner's legal representation without any remuneration.

5. I further state that each of the questions presented in the petition for certiorari are of federal constitutional stature and merit the attention of this Court.

6. I, therefore, respectfully request that this Court grant the motion for petitioner to file the enclosed

petition without prepayment of fees and costs or the giving of security therefor and to proceed in forma pauperis pursuant to Rule 46 of the Rules of the Supreme Court of the United States.

LEONARD M. MARKS
Counsel of Record

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

The foregoing affidavit of Leonard M. Marks was subscribed and sworn to before me this 5th day of March, 1982.

HOWARD LLOYD WIEDER
Notary Public

HOWARD LLOYD WIEDER
Notary Public, State of New York
No. 41-4714803
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1982

No. 81-
(No. A- )

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

---

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and GEORGIA,

Respondents.

---

I, WILLIAM HENRY HANCE, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. My counsel, Leonard M. Marks, Esq., and his law firm of Gold, Farrell & Marks, are representing me in this Court without remuneration.

5. At trial, the court appointed lawyers to sit with me. On motion for a new trial and direct appeal, the court appointed counsel to represent me. On state habeas corpus relief, I was represented by volunteer counsel, Stephen A. Kermish, Esq., and the court permitted me to file the state habeas corpus petition without prepayment of costs and to proceed in forma pauperis.

6. I believe that several errors of constitutional magnitude occurred at trial and that I am entitled to redress.

7. The nature of said cause is briefly stated as follows:

I was tried in the Superior Court of Muscogee County, a trial court of the State of Georgia, on December 11-16, 1978, for murder and attempted theft by extortion. I was convicted of both charges and was sentenced to death in the electric chair for murder and to five years imprisonment for attempted theft by extortion. I am being held at the Georgia Diagnostic & Classification Center in Jackson, Georgia. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

William Henry Hance
WILLIAM HENRY HANCE

STATE OF GEORGIA)
) ss.:
COUNTY OF BUTTS )

The foregoing affidavit of William Henry Hance, was subscribed and sworn to before me this 23 day of February, 1982.

Aaron Kosemore
NOTARY PUBLIC

My Commission Expires
4-20-83

## CERTIFICATE OF SERVICE

I, LEONARD M. MARKS, a Member of the Bar of the Supreme Court of the United States and Counsel of Record for the Petitioner, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Motion to Proceed In Forma Pauperis with supporting affidavits upon the Respondents by depositing a copy of same in the United States Mail, with first-class postage prepaid, with proper address to:

Hon. Michael Bowers
State Law Department
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Att'n: Mary Beth Westmoreland, Esq.

Hon. William J. Smith
District Attorney
Post Office Box 1340
Government Center
Columbus, Georgia 31902

I further certify that in accordance with the Rules of this Court, all parties required to be served have been served. This 8th day of March, 1982.

Leonard M Marks

LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

No. 81 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

---

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

---

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY,
STATE OF GEORGIA

---

# APPENDICES TO PETITION
VOLUME I

---

LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

MARTIN R. GOLD
HOWARD L. WIEDER
PAUL V. LiCALSI
JANE G. STEVENS
595 Madison Avenue
New York, New York 10022

Attorneys for Petitioner

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## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, providing:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case also involves the Fifth Amendment to the Constitution of the United States, providing in relevant part:

> [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case also involves the Sixth Amendment to the Constitution of the United States, providing in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . . and to have the Assistance of Counsel for his defence.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case also involves the Eighth Amendment to the Constitution of the United States, providing:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case also involves the Fourteenth Amendment to the Constitution of the United States, providing in relevant part:

> Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Application No. 1776

# SUPREME COURT OF GEORGIA

ATLANTA, October 9, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WILLIAM HENRY HANCE V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. Jordan, C.J., Hill, P.J., Marshall, Clarke, Smith and Gregory, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

B-1

David P. Ridgeway, Clerk
Martha R. Sims, Dep. Clerk
Audrey R. Halley, Dep. Clerk
Phone: 478-775-7821

# Office Of
# Clerk Superior Court
Butts County
P.O. Box 61
Jackson, Georgia 30233

Hugh D. Sanders, Senior Judge
Forsyth, Ga.
Sam L. Whitmire, Chief Judge
Barnesville, Ga.
R. Alex Crumbley, Judge
McDonough, Ga.
E. Byron Smith, D.A.
Barnesville, Ga.

July 29, 1981

1) Mr. Stephen A. Kermish, Attorney at Law, 1314 Rhodes Haverty Building, 134 Peachtree Street, Atlanta, Georgia 30303 (Certified Mail)
2) Ms. Mary Beth Westmoreland, Assistant Attorney General, Department of Law, 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334
3) Warden Walter Zant, GD&CC, POB 3877, Jackson, Georgia 30233
4) Department of Offender Rehabilitation, 800 Peachtree Street, N. E., Atlanta, Georgia 30365
5) Judge John H. Land, Chattahoochee Court Circuit, Muscogee County Courthouse, Columbus, Georgia 31902
6) District Attorney William J. Smith, Chattahoochee Court Circuit, Muscogee County Courthouse, Columbus, Georgia 31902
7) Mr. James L. Stubbs, Clerk Superior Court, Muscogee County Courthouse, Columbus, Georgia 31902

Re: William Henry Hance
vs. Walter D. Zant, Warden
No. 4967

TO THE ABOVE:

Enclosed is a copy of the ORDER denying Petition in the above-stated case, signed by Judge Crumbley on July 27, 1981, and filed in this office on July 29, 1981.

Yours truly,

Audrey R. Halley

AUDREY R. HALLEY
Chief Deputy Clerk

/arh

encl.

C-1

7/27/81

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

| | | |
|---|---|---|
| WILLIAM HENRY HANCE, | : | |
| | : | |
| PETITIONER | : | |
| | : | HABEAS CORPUS |
| VS. | : | FILE NO. 4967 |
| | : | |
| WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, | : | |
| | : | |
| RESPONDENT | : | |

ORDER

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Muscogee County. Hance was convicted of murder and attempted theft by extortion. He was sentenced to death for murder and five years imprisonment for attempted extortion. His convictions and sentences were affirmed by the Supreme Court. Hance v. State, 245 Ga. 856 (1980). Certiorari was denied by the Supreme Court of the United States.

The Petition, as amended, contains 41 numbered paragraphs, of which 34 allege substantive claims for relief (7-32; amendments 1-8). The Court will rule on those claims for relief by paragraphs corresponding numerically to the paragraphs in the Petition.

C-2

The record in this habeas case consists of the transcript of the proceedings before this Court on April 8, 1981, and the transcript and record of Petitioner's trial in the Muscogee County Superior Court.

7., 8.

In paragraphs 7 and 8, Petitioner contends his constitutional rights were violated by the allegedly illegal seizure, interrogation, and arrest without probable cause.

The Supreme Court has already concluded probable cause for the seizure and arrest of Petitioner existed. Hance v. State, supra at 863(5). Further, implicit in the Court's conclusion that Petitioner's statements were freely and voluntarily given is the finding that the interrogation of Petitioner was not illegal. Hance v. State, supra at 858(2).

Accordingly, the allegations in paragraphs 7 and 8 are found to be without merit.

9., 10.

In paragraphs 9 and 10, Petitioner charges that military investigators failed to cease questioning him after he requested the opportunity to consult an attorney. This failure violated his Fifth, Sixth, and Fourteenth Amendment rights and corresponding rights under the Georgia Constitution.

In passing on the voluntariness of Petitioner's confession, the Supreme Court found that at no point during his interrogation did Petitioner ever request an attorney or ask that the interview be terminated. Hance v. State, supra at 859. Investigator Fox reiterated this fact at the habeas proceeding. (H.T. 34).

Accordingly, the allegation in paragraphs 9 and 10 is found to be without merit.

11., 12.

In paragraphs 11 and 12, Petitioner alleges constitutional violation resulting from the refusal by military officials and Columbus police to reveal Petitioner's whereabouts to his attorney during the interrogation.

The Supreme Court, in determining the admissibility of Petitioner's confession, noted that the local attorney, who had previously represented Hance in civil matters, heard of the arrest and tried to locate him. Hance v. State, supra at 859. The attorney testified he did not handle criminal matters, was not retained but simply wanted to advise Petitioner of his rights. Id. The agents interrogating Petitioner testified they did not know of the attorney's attempts to locate Petitioner, but when they learned of this fact they immediately told Petitioner, who had already confessed, and he refused to see him. Id.



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Accordingly, this allegation is found to be without merit.

13., 14.

In paragraphs 13 and 14, Petitioner complains of constitutional deprivation from the trial court's refusal to allow the attorney who located Hance to testify as to Hance's state of mind at that point or to allow Petitioner to testify as to his willingness to submit to a polygraph exam.

During the trial the attorney was never able to establish exactly when he had seen Petitioner. Any testimony about Petitioner's state of mind, after his confessions, would not be relevant to the issue of voluntariness. Therefore, the trial court's exclusion of the attorney's testimony is not improper.

As to Petitioner's other complaint, results of polygraph exams are only admissible upon an express stipulation of the parties. State v. Chambers, 240 Ga. 76 (1977); Ross v. State, 245 Ga. 173 (1980). Absent an express stipulation in this case, Petitioner's testimony about his willingness to have taken a polygraph exam is clearly irrelevant. The trial court's exclusion of his testimony was not in error.

Accordingly, the allegations in paragraphs 13 and 14 are without merit.

15., 16.

In paragraphs 15 and 16, Petitioner argues that the introduction into evidence of portions of the victim's corpse was needlessly inflammatory, violating his constitutional rights.

The Court concedes that the evidence, portions of the victim's skull including bone chips and teeth (T.T. 875), is inflammatory. However, Petitioner did not object to their admission at trial. Furthermore, such evidence was relevant because it was found at the scene of the crime and supported the State's theory of the weapon used. Green v. State, 242 Ga. 261, 267 (1978); Cape v. State, 246 Ga. 520, 524 (1980). Being material and relevant, there was no error in admission. Green v. State, supra; Cape v. State, supra.

Accordingly, the claim for relief in paragraphs 15 and 16 is found to be without merit.

17., 18.

The issue raised in paragraph 17 and 18 has already been decided adversely to Petitioner. Hance v. State, supra at 865.

19., 20.

The objection raised in paragraphs 19 and 20 has already been decided adversely to Petitioner. Hance v. State, supra at 865.

21., 22.

In paragraphs 21 and 22, Petitioner contends that the jury charge on the element of intent impermissibly

shifted the burden of proof, depriving him of his right to due process.

The relevant portion of the charge is as follows:

> "I'm going to give you certain presumptions of law which are applicable in this case. A presumption is a conclusion that the law draws from given facts. Now, each of these presumptions is rebuttable, that is, they are subject to being overcome by evidence to the contrary. Now, these are as follows: Every person is presumed to be of sound mind and discretion. This presumption may be rebutted. The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. But these presumptions may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts, and that's you, the jury, may find such intention upon consideration of the words, the conduct, the demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.
>
> A specific intent to commit the crimes charged in this indictment, each count thereof, is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury and it's ordinarily ascertained by conduct. Intent may be shown in many ways provided you find that it existed from the evidence produced before you. It may be inferred from the proven circumstances or by acts and conduct, or it may be presumed when it is the natural and necessary consequence of the act."

(T.T. 1093-1094.)

The charge clearly indicates the presumption could be rebutted, thereby creating a permissive presumption.

Such permissive presumptions have been found valid. Skrine v. State, 244 Ga. 520 (1979).

Accordingly, this claim for relief is without merit.

23., 24.

In paragraphs 23 and 24, Petitioner contends the trial court's refusal to give an express charge on the issue of venue violated due process.

In concluding that venue was sufficiently established, the Supreme Court noted that no conflicting evidence was introduced. Hance v. State, supra at 858. In light of Petitioner's failure to offer any evidence on this issue, the Court cannot conclude Petitioner was harmed by the lack of an express charge on venue.

Accordingly, this claim for relief is without merit.

25., 26.

In paragraphs 25 and 26, Petitioner claims the trial court erred in excluding relevant mitigating testimony during the sentencing phase of the trial. Petitioner alleges he was not permitted to testify as to his mental state on the day of the offense, particularly to insist that he did not remember committing the crime.

An examination of the transcript reveals that Counsel sought to elicit testimony on the issue of why Petitioner would say and think that he did not kill anyone. (T.T. 1124-25). The court permitted

Counsel to pursue this line of questioning (T.T. 1126) until the court sustained the prosecutor's objection that the issue of Petitioner's mental state, which had not been raised in the course of the trial, was not relevant at that point. (T.T. 1127-28).

The Court concurs with the trial court's view that the proffered testimony was irrelevant in the sentencing phase, not having been previously offered. The trial court should exercise broad discretion in allowing any evidence reasonably tending toward mitigation, but the Court is authorized to hold witnesses "within reasonable bounds." Brooks v. State, 244 Ga. 574, 583-84 (1979). The trial court's exclusion of testimony relative to guilt or innocence was not unreasonable.

Accordingly, the allegation in paragraphs 25 and 26 is found to be without merit.

27., 28.

In paragraphs 27 and 28, Petitioner charges that the District Attorney made improper arguments in both the opening and closing of the guilt/innocence phase and the closing of the sentencing phase.

The Court has examined the prosecution's arguments. Petitioner has taken isolated statements out of context to buttress his claim. However, when read in their entirety, the prosecution's arguments are not improper. Wheeler v. State, 220 Ga. 535 (1965); Chenault v. State, 235 Ga. 216(7)(1975); Leutner v. State, 235 Ga. 77 (1975).

Accordingly, this allegation is found to be without merit.

29., 30.

In paragraphs 29 and 30, Petitioner claims he was denied effective assistance of counsel in the sentencing phase in violation of his constitutional rights.

At the outset the Court notes that attorneys Richard O. Smith and Walter F. Johnson, Jr. were appointed to represent Petitioner. However, Petitioner requested to be lead counsel, so Mr. Smith was appointed to serve as co-counsel. (Motion H.T. 5-12). In an affidavit, Petitioner stated that he had not advised Mr. Smith of what his defense would be or the names or expected testimony of any witnesses. (R. 20). Petitioner now claims Mr. Smith was ineffective for failing to develop any mitigating evidence even without Petitioner's assistance.

Without any guidance from Petitioner, the Court cannot conclude Counsel was ineffective for failing to garner any witnesses in mitigation.

Accordingly, this claim for relief is found to be without merit.

31., 32.

In paragraphs 31 and 32, Petitioner alleges that the acoustics in the new courtroom in which he was tried so adversely affected audibility that he was denied his right to due process.

The prosecutor in this case, Mr. William J. Smith, testified that the courtroom had been completed except for the permanent sound system. (H.T. 14). A portable address system was used. Id. The acoustics were perfect at that time even without the additional precaution of using the portable address system. (H.T. 15).

Further, Mr. Smith testified that the only reference to someone speaking up to be understood more clearly was in regard to Petitioner himself. Id. Petitioner, acting as his own counsel, did not speak loudly enough in cross-examining some witnesses. Id. As a result, the trial judge made several inquiries of the jury whether they were able to hear witnesses. (H.T. 16).

Petitioner has made no showing of bad acoustics or harm resulting therefrom.

Accordingly, this allegation is without merit.

1.

In paragraph 1 of the amended petition, Petitioner claims he was denied effective assistance of counsel.

The Court again notes that Petitioner served as his counsel and was assisted by Richard O. Smith. (See 29,30 supra).

The Court has examined the following allegations and found them to be without merit.



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Counsel failed to file a motion to suppress his confession. The Supreme Court has already concluded Petitioner's statements were freely and voluntarily given. Hance v. State, supra at 858. In light of this finding, the Court cannot conclude Petitioner was harmed by his co-counsel's failure to file such a challenge.

Counsel failed to produce an expert witness to contest the issue of venue. The Supreme Court has already concluded that venue was sufficiently proved. Hance v. State, supra at 858. Petitioner has made no showing of harm from the lack of such an expert. The Court as a result cannot conclude Counsel was ineffective for the reason posed.

Counsel failed to move for a psychiatric examination to determine Petitioner's competency. In addition to the court-ordered psychiatric examination (R. 7), Petitioner was also examined by a psychologist pursuant to the granting of Counsel's motion. (R. 27-28). Both examinations found Petitioner competent.

Counsel failed to present any witnesses in mitigation. See paragraphs 29 and 30 above.

Counsel, acting as co-counsel, filed numerous motions. (R. 8-17; 25-29). At trial, Mr. Smith cross-examined States's witnesses (T.T. 506; 545; 572; 591; 616; 619; 624; 628; 654; 663; 714; 721; 780; 818; 826; 839; 845; 849; 858; 899; 990; 998; 1002; 1011); made motions (T.T. 439-440; 454; 470; 497; 893; 1036; 1038); gave argument during the guilt/innocence phase (T.T. 1042-1053); and gave argument during the sentencing phase (T.T. 1164-1176).

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974). Disagreements about trial strategy and tactics do not require a finding of ineffectiveness. Reid v. State, 235 Ga. 378, 379; Hawes v. State, 240 Ga. 327, 329-330 (1977).

Petitioner's co-counsel easily meets this test. He prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and lack of cooperation by Petitioner. The effort Mr. Smith put forth was certainly reasonably effective within the meaning of the standard.

Accordingly, this claim for relief is found to be without merit.

2.

The Supreme Court has already decided Petitioner's confession was properly admitted. Hance v. State, supra at 858-859; 863-864.

3.

In paragraph 3 of the amended petition, Petitioner complains of error in the jury charge on aggravating circumstances, especially as to the elements of aggravated battery.

Specifically, Petitioner urges that aggravated battery must be construed in pari materia with torture in order to find the Ga. Code Ann. §27-2534.1(b)(7)

aggravating circumstance. Since there was no charge or finding of torture in this case, Petitioner argues that the application of the (b)(7) aggravating circumstance is unconstitutional.

Petitioner's argument is clearly without merit. The terms "torture", "depravity of mind", and "aggravated battery" are disjunctive rather than conjunctive terms as Petitioner contends. Fair v. State, 245 Ga. 868 (1980); Tyler v. State, 247 Ga. 119, 124 (1981). See also Hance v. State, supra at 860(3).

Further, the Supreme Court has already concluded that (b)(7) is "constitutionally applied under the evidence in this case." Hance v. State, supra at 867.

There is also no requirement, as urged by Petitioner, that mitigating circumstances be singled out to the jury, Thomas v. State, 240 Ga. 393 (1977), or that the relationship between aggravating and mitigating circumstances be explained, Gates v. State, 244 Ga. 587(6)(1979).

Accordingly, this allegation is found to be without merit.

4.

In paragraph 4 of the amendment, Petitioner alleges the trial court, in determining Petitioner's competency to assist in his own defense, failed to follow the procedure set out in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Petitioner claims Faretta places an express duty upon the trial court to make the defendant aware of

the dangers and disadvantages of self-representation and further claims such was not done in this case.

At the pretrial motions hearing, Petitioner's motion to serve as his own counsel was discussed at length. (M.T. 5-13).[1] The trial judge inquired into Petitioner's legal knowledge, especially as to whether Petitioner was aware he was facing the maximum penalty of execution. (M.T. 7, 9). The trial judge warned Petitioner he was subject to the rules of procedure and evidence (M.T. 9); that rulings on objections or motions were final (M.T. 9); that directions from the trial court were to be accepted without argument (M.T. 10); that Petitioner would be subject to contempt (M.T. 10); and that the Court would intervene and have his co-counsel instruct Petitioner on how to proceed if such need arose. (M.T. 11).

Further, Counsel for Petitioner stated that he had advised Petitioner against serving as his own counsel. (M.T. 12). There is also the affidavit of Petitioner in which he stated his decision was a product of his free will and that he had been advised of the dangers of serving as his own counsel. (R. 20; T.T. 1034).

The record clearly indicates Petitioner knowingly and intelligently decided to forgo his right to counsel and was well aware of the dangers and disadvantages of

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[1] Motions Transcript of November 27, 1978.

self-representation. The Court finds that the procedures, as such, set out in Faretta v. California, supra, were readily met.

Accordingly, this claim for relief is found to be without merit.

5.

In paragraph 5, Petitioner charges the death penalty is administered arbitrarily, capriciously, and whimsically. In that Petitioner has presented no proof on this issue, the allegation is found to be without merit.

6.

In paragraph 6, Petitioner claims his death is being exacted pursuant to a pattern of State authorities to discriminate on grounds of race, sex and poverty in administering capital punishment. Since Petitioner has made no showing to support his contention, the allegation is found to be without merit.

7.

Petitioner has presented no evidence to show that the death sentence is an excessive penalty which fails to serve any rational interest. Accordingly, the allegation in paragraph 7 is found to be without merit.

8.

The "prosecution-prone" argument raised in paragraph 8 has been rejected by the Supreme Court. Douthit v. State, 239 Ga. 81, 87 (1977); Hawes v. State, 240 Ga. 327(5)(1977).

WHEREFORE, all allegations in the amended petition having been found without merit, the Petition is denied.

SO ORDERED, this 27 day of July, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

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UNITED STATES, Appellee,

v.

Specialist Four William H. HANCE, SSN 226-74-1289, United States Army, Appellant.

CM 438558.

U. S. Army Court of Military Review.

31 Oct. 1980.

Accused specialist four, United States Army, was convicted by court-martial, R. K. McHugh, J., of two specifications of premeditated murder, and he appealed. The Army Court of Military Review, O'Donnell, J., held that: (1) accused had been "apprehended" within meaning of Fourth Amendment prior to interrogation; (2) information presented by the Government fell short of establishing probable cause for arrest; (3) the Government failed to demonstrate that taint of arrest had dissipated prior to accused's confession; and (4) rehearing would be ordered where it appeared that at time of apprehension arresting officers were aware of other evidence, not introduced by the Government, tending to show existence of probable cause.

Findings and sentence set aside; rehearing authorized.

1. Military Justice ⇐245

Testimony of jurors will not be received to impeach their verdict with respect to matters which essentially inhere therein, but exceptions may be made where extraneous prejudicial information was improperly before the jury or where outside influences were improperly brought to bear on the jury.

2. Military Justice ⇐245

Where there were no allegations of extraneous influences, Court of Military Review would decline to consider posttrial statements from several court-martial members, after accused was convicted of two specifications of premeditated murder, that evidence was insufficient to convince such members beyond a reasonable doubt that accused killed one of the victims and was insufficient to convince such members that accused was mentally competent to premeditate murder. Military Rules of Evidence, Rule 606(b).

3. Military Justice ⇐170

Statements obtained as result of illegal arrest are violative of the Fourth Amendment and inadmissible as "fruit of the poisonous tree" but exclusionary rule is inapplicable if the government learned of the evidence from an independent source or if the connection between the illegal arrest and the challenged evidence has become so attenuated as to dissipate the taint. U.S.C.A.Const. Amend. 4.

4. Military Justice ⇐113

"Apprehension" is the taking of a person into custody, and although it may be effected by clearly notifying the person to be apprehended that he is thereby taken into custody, it is the substance of the surrounding circumstances that controls rather than the form. UCMJ, Art. 7(a), 10 U.S.C.A. § 807(a); MCM 1969, par. 19, subd. c.

See publication Words and Phrases for other judicial constructions and definitions.

5. Military Justice ⇐113

Where accused was taken into custody and was not free to leave, he was "apprehended" within meaning of the Fourth Amendment. U.S.C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

6. Military Justice ⇐113

Information that accused had been seen with murder victim on night before she disappeared and had informed military police that he had overheard conversation concerning death of a female soldier fell short of establishing probable cause for arrest. U.S.C.A.Const. Amend. 4; UCMJ, Art. 7(b), 10 U.S.C.A. § 807(b).

7. Military Justice ⇐173

Statement by accused could not be considered in establishing probable cause for

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apprehension where it was not offered for its truth and, in any event, was hearsay as to what accused knew and as such was incompetent evidence.

**8. Military Justice ⇐171**

Giving of Article 31 and *Miranda* warnings does not operate per se to remove taint from illegal arrest. U.S.C.A.Const. Amends. 4, 5; UCMJ, Art. 31, 10 U.S.C.A. § 831.

**9. Military Justice ⇐170**

Though accused did not confess until the second day after his arrest, which was not shown to be supported by probable cause, the Government failed to demonstrate that taint of arrest was dissipated, and thus resulting confessions and other derivative evidence was inadmissible, where accused made several admissions during initial stages of interrogation and the taint was exploited by prolonged interrogation and irregular confinement of accused.

**10. Military Justice ⇐332**

Though fact that evidence unaffected by taint of arrest not shown to be supported by probable cause was insufficient to support findings of guilt would normally require dismissal of charges, rehearing would be ordered at which question of probable cause could be further developed where it appeared that at time of apprehension the arresting officers were aware of evidence not introduced by the Government tending to show existence of probable cause.

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Major Robert D. Ganstine, JAGC, argued the cause for the appellant. With him on the brief were Colonel Edward S. Adamkewicz, Jr., JAGC, Lieutenant Colonel John F. Lymburner, JAGC, Major Grifton E. Carden, JAGC, and Captain Peter A. Nolan, JAGC.

Captain Michael C. Chapman, JAGC, argued the cause for the appellee. With him on the brief were Colonel R. R. Boller, JAGC, Major Ted B. Borek, JAGC, Captain Brian X. Bush, JAGC, Captain Glenn D. Gillett, JAGC, and Captain Paul G. Thomson, JAGC.

Before RECTOR, CARNE and O'DONNELL, Appellate Military Judges.

## OPINION OF THE COURT

O'DONNELL, Judge:

On the sixth day of September 1977, the nude body of Private First Class Karen Hickman was found on the military reservation at Fort Benning, Georgia. Her clothing was discovered on the first of October of that year as the result of an anonymous telephone call to the military police. Several months later, on the third of April 1978, the military police received a telephone call from a person identifying himself as a member of the "Forces of Evil." The caller stated that the body of a woman named Irene could be found on one of the Fort Benning ranges. A search of the area resulted in the discovery of a practically-nude body of a woman later identified as Irene Thirkield, a civilian resident of nearby Columbus, Georgia. On the following day, two criminal investigators, Special Agent Richard F. Fox and Special Agent Marvin D. Besson, located the appellant at his unit and brought him to their office where he eventually confessed to the killing of both women. At his subsequent court-martial, the appellant was convicted of two specifications of premeditated murder and sentenced to a dishonorable discharge, total forfeitures, confinement at hard labor for life, and reduction to the lowest enlisted grade. The convening authority approved the sentence.[1]

After trial, the defense counsel petitioned the convening authority to disapprove the Hickman charge and to reduce the Thirkield charge to unpremeditated murder. In support of his petition, he offered statements from several court-martial members. Five of the nine members sitting on the

1. Hance was also convicted by a Georgia court of killing Gail Jackson, a local civilian. He received the death sentence for this offense.



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court signed individual unsworn statements in which they stated that the evidence presented at trial "was insufficient to convince me beyond a reasonable doubt that SP4 Hance killed PVT Karen Hickman." Four of these members also signed unsworn statements in which they stated that the evidence "was insufficient to convince me that SP4 Hance was mentally competent to premeditate murder." The staff judge advocate referred to the petition in his post-trial review without further comment. The convening authority took no direct action on the petition, although, as noted, he did approve the sentence as adjudged, thereby impliedly approving the findings.

[1, 2] The military follows the general rule that "testimony of jurors will not be received to impeach their verdict, with respect to matters which essentially inhere therein...." *United States v. Bourchier*, 5 U.S.C.M.A. 15, 27, 17 C.M.R. 15, 27 (1954). Exceptions may be made "where extraneous prejudicial information was improperly before the jury or where outside influences were improperly brought to bear on the jury...." *United States v. Higdon*, 2 M.J. 445, 455 (ACMR 1975). As there is no allegation of such extraneous influences, we decline to consider these statements. *See United States v. West*, 23 U.S.C.M.A. 77, 48 C.M.R. 548 (1974), and cases cited therein. *See also*, Rule 606(b), Military Rules of Evidence.

[3] The appellant also contends, as he did at trial, that his several written and oral statements were inadmissible as the product of an illegal apprehension. Statements obtained as a result of an illegal arrest are violative of the Fourth Amendment and inadmissible as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Not all evidence obtained following an illegal arrest is inadmissible. As the Court noted in *Wong Sun*, the exclusionary rule is inapplicable if the Government learned of the evidence from an independent source or if the connection between the illegal arrest and the challenged evidence has become "'so attenuated as to dissipate the taint.'" *Id.* at 487, 83 S.Ct. at 417, quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920). *See Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

Our analysis then must focus primarily on three areas of concern: was the appellant apprehended within the meaning of the Fourth Amendment; if so, was the apprehension supported by probable cause; and, assuming an illegal apprehension, was the taint sufficiently dissipated to permit use of the challenged evidence at trial.

I

[4] An apprehension, which is the military analogue of a civilian arrest, is "the taking of a person into custody." Article 7(a), Uniform Code of Military Justice, 10 U.S.C. § 807(a). Although it may be effected by "clearly notifying the person to be apprehended that he is thereby taken into custody" (paragraph 19c, Manual for Courts-Martial, United States, 1969 (Revised edition)), it is the substance of the surrounding circumstances that controls rather than the form. *See United States v. King*, 42 C.M.R. 1004, 1006 (AFCMR 1970).

[5] In the instant case, Agent Fox testified that he "apprehended Specialist Hance as a suspect in the murder of Irene Thirkield." He so advised the appellant and told him to accompany him to his office. The appellant was not free to leave without permission from Fox.

Special Agent Besson provided a somewhat different version of the initial meeting with the appellant on 4 April. According to Besson, he and Fox told the appellant that they "wanted to talk to him about the two women that had been killed downtown, and we asked him if he would come with us to our office and he agreed." On cross-examination, however, Besson stated that he and Fox took the appellant into custody and that he was not free to leave.

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Under the circumstances we are satisfied that the appellant was apprehended within the meaning of the Fourth Amendment.[2]

II

We turn then to the question of probable cause. An arrest or seizure under the Fourth Amendment must be founded on probable cause. *Wong Sun v. United States, supra.* The military equivalent of probable cause is found in Article 7(b) of the Code.[3]

[6, 7] The facts and circumstances relied on by the Government at trial as expressed by Agent Fox were essentially two-fold. The first and most immediate was that on 3 April 1978 Fox received word that the appellant had been seen in a bar with Irene Thirkield on the night she disappeared. The second related to the appellant's previous dealings with the military police. On the sixth of December 1977, the appellant voluntarily came forward and informed the military police authorities that he had overheard two or three Blacks in a club at Fort Benning discussing the death of a female soldier. A few weeks later, he informed the military police that some Blacks walked into a club where he was and immediately walked out. He neither saw nor heard anything significant at that time and received no threats from anyone. In the middle of January, Fox met with the appellant to see if he had received any further information. The appellant indicated that he had not. At that time, the appellant's fingerprints were taken with his consent.[4] Fox testified that he believed he had probable cause to apprehend the appellant.[5]

We are not satisfied that the evidence presented by the Government was sufficient to warrant a prudent person in concluding that the appellant had committed an offense. The information certainly warranted additional questioning but fell short of establishing probable cause to arrest the appellant.[6]

III

We turn then to the question of whether the taint of the illegal apprehension was dissipated.

The appellant was taken to the CID office at approximately 1330 hours on 4 April. He was immediately informed of his right

2. The Government's position at trial was that there was an apprehension based on probable cause. On appeal, however, the Government contends *inter alia* that the appellant was not apprehended within the meaning of the Fourth Amendment but voluntarily accompanied the agents to the CID office.

3. "Any person authorized under regulations governing the armed forces to apprehend persons subject to [the Code] or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it." *See Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964).

4. Fox stated in response to a question that the appellant was not a suspect at this time. Fingerprints were being taken routinely from "anyone that was connected in any way with the case."

5. Agent Besson, on the other hand stated that he did not believe there was probable cause to apprehend the appellant on 4 April. Besson's position seems to be that there was no apprehension but that the appellant voluntarily accompanied the agents to the CID office. This also was the basis for the judge's ruling admitting the statements as reflected in his special findings.

6. The Government would have us consider a handwritten statement by the appellant authorizing the taking of voice samples. In that statement (Prosecution Exhibit 8), which was dictated to the appellant by Agent Besson, there appears the following: "I have been informed by CID agent Besson that he had received information that I have made telephone calls concerning two Columbus women that has [sic] been killed." The Government points out that the previous day the appellant's company commander and first sergeant identified his voice from a recording of the anonymous telephone call informing the authorities of the location of Irene Thirkield's body. Inexplicably, this information was not presented by the Government on the issue of probable cause. The statement in Prosecution Exhibit 8 cannot be considered by us for this purpose. It was not offered for its truth and thus has no relevance as to probable cause. Even if it had been offered for its truth, it is hearsay as to what Besson knew and as such incompetent evidence.

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to counsel and of his right to remain silent, both of which he waived. He was then questioned about the Thirkield death until about 2200 hours that night. Initially, the appellant stated that he met Miss Thirkield at a local bar on 15 March and took her to a club on the Fort Benning reservation. He added that he later left her and went home by himself. During this interrogation, the appellant provided Agent Besson with handwriting exemplars. He then admitted writing several letters to the Columbus police authorities and one to a local newspaper. These letters were purportedly written on behalf of the "Forces of Evil" concerning Irene Thirkield and Gail Jackson. He claimed that the "Forces of Evil" compelled him to write the letters. The appellant then told his interrogators that he was coerced by the "Forces of Evil" to pick up Irene Thirkield and deliver her to them on the evening in question. The appellant also admitted making several telephone calls to the military police, again claiming that he was forced to do so by the "Forces of Evil." After Fox finished questioning him that day, the appellant was interviewed by agents of the Federal Bureau of Investigation and members of the Columbus police force. He was then placed in bachelor enlisted quarters under guard for the night.

The following morning the criminal investigators, after first warning him of his rights, continued questioning the appellant. At this time, he admitted being present when Irene Thirkield and Gail Jackson were killed, but denied that he assisted in the killings. However, after a lunch break, the appellant admitted killing the two women himself. He also admitted that there was no such organization as the "Forces of Evil." His confession was reduced to writing and received in evidence over objection at his trial.

The agents, after appropriate warnings, then questioned the appellant about the Karen Hickman killing. He first stated that he overheard two men discussing the killing but was told to keep his mouth shut. Then, according to the appellant, he was told to call the military police and inform them of the location of Hickman's clothing. This statement was reduced to writing and received in evidence over objection. The questioning on 5 April ended at 1800 hours. The appellant was returned to the same room where he remained for the night under guard.

The following day, after being warned of his rights, the appellant admitted killing Karen Hickman. This statement was also reduced to writing and received in evidence over objection. After confessing to the Hickman killing, the appellant took the agents to the scene of the crime and showed them where he had thrown her clothing.

[8] In *Brown v. Illinois, supra*, the Supreme Court reaffirmed the principles announced in *Wong Sun* and enunciated several factors to be considered in determining whether a confession has been obtained by exploitation of an illegal arrest. "The temporal proximity of the arrest, . . . the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. And the burden of showing admissibility rests, of course, on the prosecution." *Brown v. Illinois*, 422 U.S. at 603–04, 95 S.Ct. at 2261–62 (Citations and footnotes omitted.).[7] Neither *Wong Sun* nor *Brown* established a "but for" or *per se* rule. Rather, the issue must be decided on the facts of each case. It must be emphasized that in this area we are dealing with the protection of Fourth Amendment rather than Fifth Amendment rights. "Thus, even if the statements in this case [are] found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains." *Id.* at 601–02, 95 S.Ct. at 2260–61.[8]

7. The Court also noted that "*Miranda* warnings are an important factor" in this equation. *Id.* Of course, if *Miranda* warnings are not given when required, the resulting confession is inadmissible on *Miranda* grounds without regard to Fourth Amendment considerations. *See* note 8, *infra*.

8. Voluntariness is a threshold requirement. If the statements are determined to be involuntary under the Fifth Amendment, the Fourth

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[9] The factor of temporal proximity contemplates that the passage of time between the arrest and the confession diminishes the probability that the confession is tainted. In the instant case, the appellant did not confess until the second day. However, he made several admissions during the initial stages of the interrogation. In fact, immediately upon being apprehended, he said, "I will tell you about the girl." Moreover, a significant passage of time, depending on the circumstances, can increase rather than diminish the likelihood of a tainted confession. As Justice Stevens noted in his concurring opinion in *Dunaway v. New York*, 442 U.S. at 220, 99 S.Ct. at 2260:

> The temporal relationship between the arrest and the confession may be an ambiguous factor. If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest rather than a short one.

In this case the apprehension was exploited in that the interrogation was prolonged and the appellant was not free to leave. Indeed, he was confined to bachelor enlisted quarters for two nights.[9]

As to the purpose and flagrancy of the police action, this factor was important in *Brown* because of the obvious impropriety of the arrest in that case. Here, although the apprehension was not flagrant, it was investigatory in nature, a significant consideration in *Brown*.[10] This "purpose and flagrancy" factor assumed less importance in *Dunaway* where the police apparently acted in good faith and the arrest was not flagrant.[11] The Court in that case attached more significance to the lack of intervening circumstances. In the instant case, there were no significant intervening circumstances which would attenuate the taint. To the contrary, as noted, the taint was exploited by the prolonged interrogation and the irregular confinement of appellant.

The Government has failed to establish the legality of the appellant's apprehension and has not demonstrated that this taint was dissipated. The resulting confessions and other derivative evidence therefore were inadmissible.[12]

[10] As the unaffected evidence is insufficient to support the findings of guilty, the

Amendment question is never reached. We are satisfied that the appellant's statements meet the requirements of the Fifth Amendment and Article 31 of the Code, 10 U.S.C. § 831 and therefore are voluntary. The giving of Article 31 and *Miranda* warnings, however, does not operate *per se* to remove the taint from an illegal arrest. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

9. When asked why the appellant was not placed in the stockade after the first day's interrogation, Agent Besson remarked that he did not consider they had sufficient evidence for that purpose and they feared that the appellant, once he had been confined in the stockade, would refuse to cooperate in answering questions.

10. In *Brown*, the Court noted at p. 605, 95 S.Ct. at p. 2262:

> The impropriety of the arrest was obvious; awareness of the fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up.

11. *See United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), where the Fifth Circuit En Banc adopted a new rule for that circuit whereby "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken belief that they are authorized." 622 F.2d 840. This is the position taken by the two dissenting justices in *Dunaway* and inferentially rejected by the majority and concurring justices.

12. The Government argues that *Dunaway*, which was decided during the *Hance* trial, should not be applied retroactively. Although there is authority to the contrary (*e. g., United States v. Tucker*, 610 F.2d 1007 (2d Cir. 1979)), we need not reach that issue. The only new issue resolved by *Dunaway* was "the legality of custodial questioning on less than probable cause for a full-fledged arrest." *Dunaway v. New York*, 442 U.S. at 202, 99 S.Ct. at 2251 (1979). That issue is not present in this case. The basic principles announced in *Wong Sun* and *Brown* remain unchanged in *Dunaway* and are controlling here.

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conviction must be reversed. This would normally require dismissal of the charges. However, it appears that at the time of the apprehension the arresting officers were aware of other evidence, unaccountably not introduced by the Government, tending to show the existence of probable cause. In an exhibit to its appellate brief, the Government presented information showing that on the day before the appellant was apprehended Fox and Besson were informed that the appellant's company commander and the first sergeant identified him as the person who made the telephone call concerning the location of Irene Thirkield's body. *See* note 6, *supra*. Under the circumstances, a rehearing may be ordered at which the question of probable cause for the apprehension may be further developed. *See United States v. Davenport*, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963).

The findings of guilty and the sentence are set aside. A rehearing is authorized.[13]

Chief Judge RECTOR and Senior Judge CARNE concur.

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13. We note that the military judge over defense objection used the reasonable doubt instruction held to be deficient in *United States v. Salley*, 9 M.J. 189 (CMA 1980). This deficiency, we are certain, will be corrected at any rehearing.

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SUPREME COURT OF GEORGIA

245 Ga. 856



36012. HANCE v. THE STATE.

UNDERCOFLER, Chief Justice.

The appellant, William Henry Hance, was convicted by a jury in the Superior Court of Muscogee County of the murder of Gail Faison and attempted theft by extortion. He was sentenced to death for the murder and five years imprisonment for the attempted extortion. This is his appeal.

*Summary of Facts.*

From the evidence presented at trial, the jury was authorized to find the following facts:

On or about February 28, 1978, the appellant, a soldier stationed at Fort Benning, Columbus, Georgia, went to the Sand Hill Bar located near the base for a drink. While in the bar, he was solicited by the victim, a prostitute named Gail Faison, also known as Gail Jackson or Gail Bogen. The appellant agreed to a price of $20.00 and they got into his car. He drove 200 yards up the road to an area she selected and stopped. She began to undress when the appellant for no other reason than the victim was a prostitute, became enraged. He grabbed the victim and as she tried to get away, he hit her with a karate chop across her head. She fell unconscious. The appellant then pulled her out of the car, dislocating her elbow in the process. He returned to his car for a moment, but thinking she was still alive, he got a jack handle from his car, and finding his victim to be still breathing, repeatedly struck the helpless victim in the face. The beating was so severe that the victim's entire face was destroyed and bone fragments were scattered about the area. Some of the victim's brain tissue was literally beaten from the skull. The force of the appellant's attack was so great it produced a depression in the ground behind the victim's head. The appellant then buried the victim's body in a shallow grave he dug with an entrenching tool.

During this period of time, the City of Columbus was being terrorized by a series of unsolved strangulation murders. Beginning on March 3, 1978, the appellant, in order to avert suspicion from himself, sent a total of five letters to the Chief of Police of Columbus, Georgia, and

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one letter to the local newspaper. These letters were written on Army stationery and demanded that either the Columbus strangler be caught by a certain date or a female named Gail Jackson would be executed. The letters were signed "Forces of Evil," a fictitious group the appellant had created. The second of these letters received by the Chief of Police demanded either the apprehension of the Columbus strangler or a $10,000 ransom in return for the victim's safety. In addition, the appellant found an Army Cap with a different unit insignia than his unit and placed this near the crime scene, also in order to avert suspicion.

On March 15, 1978, the appellant went to Vice Mitchell's Bar. While there, Irene Thirkield asked him to give her a ride to the Sand Hill bar. While in appellant's car she solicited him. After she had removed her clothes, appellant again became enraged and attacked her in the same manner as he had attacked the first victim. He beat Irene Thirkield so severely that her entire head was missing from her body. Appellant hid her body on the military reservation behind a pile of logs.

On March 30, 1978, the appellant called the military police and told them exactly where to find Gail Faison's body. The body was recovered that afternoon.

Appellant thereafter added the name "Irene" to the letters he was sending to the police chief and stated that she, like his first victim, would die unless the terms were met. In the fourth letter received by the Columbus police, the appellant detailed the exact manner of the killing of Gail Faison, including the dislocated elbow.

Again, in a similar manner to the calls made regarding his first victim, the appellant called the military police.

The military police, acting upon information that the appellant was the last person seen with Irene Thirkield, questioned the appellant and obtained a confession as to both murders. Subsequently, the appellant also gave a confession to Columbus authorities. He told authorities where he had disposed of the murder weapons and clothes of the victims. These were subsequently recovered. Handwriting samples were obtained from the appellant and were matched with handwriting on the letters

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received by the chief of police. A fingerprint from one of the letters was determined to be that of the appellant.

*Enumerations of Error.*

1. Appellant contends in his first enumeration of error that the State failed to prove venue sufficiently as a matter of law.

The State presented evidence that the body of the victim was found within Muscogee County in close proximity to the Fort Benning military reservation. Agent William Wanninger testified that he pointed out the location of the body to the City Engineer of Columbus, Georgia, James D. Webb. The city engineer testified that the location shown to him was situated within the county and was not part of the Federal military reservation. No conflicting evidence was introduced. *Climer v. State*, 204 Ga. 776 (51 SE2d 802) (1949). This evidence was sufficient to establish venue in Muscogee County. *Wimbash v. State*, 70 Ga. 718 (3) (1883); *Ellard v. State*, 233 Ga. 640 (212 SE2d 816) (1975); *Aldridge v. State*, 236 Ga. 773 (225 SE2d 421) (1976).

2. In his second enumeration of error, appellant asserts that the trial court erred in failing to suppress his confessions because they were not freely and voluntarily given. Appellant urges that the criteria enumerated in the case of *Riley v. State*, 237 Ga. 124 (226 SE2d 922) (1976), should be used in determining the voluntariness of the confession. *Riley*, however, involved the confession of a juvenile. The State is under a heavier burden in showing that a juvenile understood and waived his rights. See *Massey v. State*, 243 Ga. 228 (253 SE2d 196) (1979). Therefore, the criteria set forth in that case does not apply in the case of an adult's confession.

The appellant was given a Jackson v. Denno hearing and the trial court determined that the confession was freely and voluntarily given. The trial court's determination was not clearly erroneous. Under these circumstances the determination in favor of admissibility is accepted by the appellate court. *Johnson v. State*, 233 Ga. 58 (209 SE2d 629) (1974); *Amadeo v. State*, 243 Ga. 627 (255 SE2d 718) (1979); *Burney v. State*, 244 Ga. 33 (257 SE2d 543) (1979); *McCiesky v. State*, 245 Ga. 108 (263

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SE2d 146) (1980). In this case the evidence shows that agents from the military criminal investigation division stationed at Fort Benning, acting through appellant's commanding officer, requested that appellant accompany them to CID headquarters for the purpose of being interviewed. Appellant readily agreed. The interview began at approximately 12:45 p.m. and lasted until 10:20 p.m. Appellant was advised of his rights under the Fifth and Sixth Amendments. He signed a waiver and was informed that the interview pertained to the murder of Irene Thirkield. Appellant made incriminating statements that afternoon in which he admitted writing the letters signed "Forces of Evil," but was compelled to do so by that "organization." The appellant was then interviewed by local authorities and the F.B.I. He was housed overnight in the Bachelor Enlisted Quarters under guard. The next morning at approximately 7:30 a.m. he was again advised of his rights and he signed a written waiver. The interview terminated at 3:00 p.m. after a written confession was obtained. The appellant was interviewed for a total time of 18 hours. During this period, however, he was fed lunch and dinner, allowed to use the restroom, smoke and eat snacks. The questioning was not continuous but was spread over a two-day period. At no time did the appellant request an attorney or ask that the interview be terminated. A local attorney who had represented the appellant in civil matters heard of his arrest and called the county jail, Columbus police headquarters and CID headquarters at Fort Benning. He testified he did not handle criminal matters, was not retained but simply wanted to advise the appellant of his rights. The attorney was not able to locate the appellant.

The agents questioning the appellant testified they did not know that an attorney was attempting to find the appellant, but when they learned this fact they immediately told the appellant, who had already confessed, and he refused to see him.

No threats nor promises were made to the appellant during the interrogation.

Under these circumstances, appellant's statement was freely and voluntarily given and the trial court did

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not err in failing to exclude it.

3. In his fourth enumeration of error, appellant attacks the constitutionality of Code Ann. § 27-2534.1 (b) (7). He argues that any injury grave enough to cause death is an aggravated battery within the statute and therefore the statute is overbroad and vague in violation of the due process clause of the United States Constitution and the Constitution of the State of Georgia. However, the Supreme Court of the United States has upheld the constitutionality of the statute when attacked on these same grounds. Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976). This court has held that this Code section will not be permitted to become a "catchall" and upon sentence review will restrict affirmance to those cases which lie at the very core of the Code section. *Harris v. State*, 237 Ga. 718 (230 SE2d 1) (1976). See *Patrick v. State*, 245 Ga. 417 (265 SE2d 553) (1980).

Recently the United States Supreme Court has considered this section as applied to a specific factual situation. Godfrey v. Georgia, 48 USLW 4541 (1980). In Godfrey v. Georgia, it was held that Code Ann. § 27-2534.1 (b) (7), although constitutional, was unconstitutionally applied under the specific facts of that case. In order for Code Ann. § 27-2534.1 (b) to be constitutionally applied in a given case, we hold that the evidence presented at trial must satisfy the following criteria as they apply to the specific factual situation of each case.

Code Ann. § 27-2534 (b) (7) provides in pertinent part: "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim."

This statutory aggravating circumstance consists of two major components, the second of which has three sub-parts, as follows: (I) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated batter to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant. In determining "[w]hether . . . the evidence supports the jury's or Judge's finding of [this] statutory aggravating circumstance . . . " (Code Ann. § 27- 2537 (c)

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(2)), the evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component, as hereinafter set forth. See *Fair v. State*, 245 Ga. 868 (1980), post.

The phrases "outrageously or wantonly vile, horrible or inhuman" are words of common understanding, have essentially the same meaning, and are included in the statute to distinguish ordinary murders for which the penalty of death is not appropriate, from those murders for which the death penalty may be imposed. Godfrey v. Georgia, supra.

Under the plain meaning of the statute, not only must the murder be outrageously or wantonly vile, horrible or inhuman, but in addition, the facts of the case must show either an aggravated battery to the victim, torture of the victim, or depravity of mind of the defendant as hereinafter explained.

An aggravated battery occurs when "[a] person . . . maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." Code Ann. § 26-1305. In order to constitute aggravated battery, the bodily harm to the victim must occur before death. Godfrey v. Georgia, supra.

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, slip opinion, p. 10. Serious sexual abuse may be found to constitute serious physical abuse. *House v. State*, 252 Ga. 140 (205 SE2d 217) (1974). Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined.

Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

Insofar as aggravated battery and torture are concerned, only facts occurring prior to death may be considered. The death of a victim who dies in-

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stantaneously with little or no forewarning does not involve torture or aggravated battery (Godfrey v. Georgia, 48 USLW 4541 (1980); *Mulligan v. State*, 245 Ga. 266 (264 SE2d 204) (1980)); i.e., only facts showing aggravated battery or torture (as hereinabove defined)), which are separate from the act causing instantaneous death, will support a finding of torture or aggravated battery. The instantaneous death of a victim as a result of being killed by a shotgun, although the scene of death be gruesome (no other facts appearing), does not constitute torture, aggravated battery or depravity of mind. (Godfrey v. Georgia, supra.)

Where only facts occurring prior to death are relied upon to support a finding of torture or aggravated battery, the fact that the victim was tortured or was the victim of an aggravated battery will also support a finding of depravity of mind of the defendant; i.e., a defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind.

In determining whether the evidence shows "depravity of mind," the age, and the physical characteristics of the victim may be considered. See *Thomas v. State*, 245 Ga. 688 (1980).

A defendant who mutilates or seriously disfigures the victim's body after death (cf. Code § 26-1305, supra), or who commits a sex act upon the victim's body after death may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of the statute.

Where it cannot be determined whether the victim was subjected to an aggravated battery or torture before death, or to mutilation or disfigurement after death, because the exact time of death or the precise act causing death cannot be ascertained, the penalty of death nevertheless may be sustained on the basis of aggravated battery or serious physical abuse before death or depravity of mind demonstrated after death.

As heretofore stated, the evidence must be sufficient to satisfy the first major component of statutory aggravating circumstance seven (7) ("outrageously or wantonly vile, horrible or inhuman"), and at least one (or

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more) of the three parts of the second component (aggravated battery to the victim, or torture to the victim, or depravity of mind of the defendant).[1]

Review of the actual application of the section to the evidence in the case is a matter of sentence review and will be considered in that division of this opinion.

4. The trial court in the sentencing phase instructed the jury that they were authorized to consider the death penalty if they found the following statutory aggravating circumstance beyond a reasonable doubt: "The offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim." Code Ann. § 27-2534.1 (b) (7).

Appellant in his third enumeration of error argues that under Code Ann. § 27-2534.1 (b) (7), a jury is not authorized to impose a death penalty unless they find not only an "aggravated battery," but also "depravity of mind." This enumeration is without merit.

To have charged "depravity of mind" would have given the jury an additional ground in which the jury could have found the existence of the statutory aggravating circumstance and therefore would have been detrimental to the appellant. See Division 3. Appellant cannot complain of a charge which is beneficial to him.

5. Appellant's fifth enumeration of error contends that his statements made during his interrogation should have been excluded because these statements were the product of an illegal arrest without probable cause. Appellant argues that an arrest is a seizure within the meaning of the Fourth Amendment and therefore an arrest absent probable cause violates the amendment, thereby triggering the exclusionary rule. Dunaway v. New York, — U. S. — (99 SC 2248, 60 LE2d 824) (1979). However, appellant never challenged the legality of his arrest and raises this argument for the first time on appeal. *Fleming v. State*, 243 Ga. 120 (252 SE2d 609) (1979); *Mallory v. State*, 230 Ga. 657 (198 SE2d 677)

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[1]Justice Harold Hill is the author of Division 3 of this opinion.

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(1973); *Jackson v. State*, 229 Ga. 191 (190 SE2d 530) (1972). The legality of the arrest not being challenged below, the trial court did not err in admitting defendant's confessions.

Notwithstanding appellant's failure to object below, we find that upon careful examination of the record, probable cause for the appellant's arrest existed.

Agents of the military police were in possession of the following information prior to appellant's arrest. First, from the phone calls they knew the person who killed the victims was a young black male. Second, they knew that the perpetrator was a soldier because the calls they received showed an intimate knowledge of the military reservation and the letters were written on military stationery. Also, a military cap was found near one of the bodies. Finally, they knew that the appellant, a young, black male soldier, was the last person seen with a victim prior to her death. Such information would lead a reasonably cautious person to believe that appellant had committed the offense, thereby furnishing probable cause for his arrest. See Propes v. United States, 358 U. S. 307 (1958); Beck v. Ohio, 379 U. S. 89 (1964); *Strauss v. Stynchcombe*, 224 Ga. 859 (165 SE2d 302) (1968); *Peters v. State*, 114 Ga. App. 595 (152 SE2d 647) (1966).

6. In his sixth enumeration of error, appellant contends not only that the rule of Witherspoon v. Illinois, 391 U. S. 510 (1967), was violated with respect to four veniremen, but also that the trial court used a "double standard" when it failed to exclude a venireman for cause as being predisposed to the imposition of the death penalty. We do not agree. The transcript shows that the prospective jurors' opposition to capital punishment met the Witherspoon test as reiterated in Lockett v. Ohio, 438 U. S. 586 (1978); *Harris v. Hopper*, 243 Ga. 244 (253 SE2d 707) (1979).

One potential juror, upon voir dire examination, favored the imposition of the death penalty. However, it is clear from the transcript that this potential juror would consider both punishments authorized by law in her deliberations. She was not "irrevocably committed" to the sentence of death no matter what the facts and circumstances of the case. It therefore follows that the

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court's failure to excuse the juror upon motion was not based upon a "double standard." *Patrick v. State*, supra.

7. The appellant was represented prior to trial by court-appointed counsel. Appellant moved that he be allowed to represent himself at trial, which motion was granted. However, court-appointed counsel assisted the appellant throughout the trial. Counsel examined potential jurors, cross examined witnesses and made timely objections. Prior to trial appointed counsel had filed pretrial motions. On appeal, appellant is represented by two appointed attorneys. Appellant, however, has filed in letter form a list of errors which he requests we address. While such a procedure is improper, we will nevertheless address the issues presented.

The evidence viewed in a light most favorable to the verdict would authorize a rational trier of fact to find each essential element of the crimes of murder and attempted theft by extortion beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

The failure to afford the appellant a preliminary hearing is not grounds for reversal. *State v. Middlebrooks*, 236 Ga. 52 (222 SE2d 343) (1976).

The appellant complains that he was not afforded a State-appointed expert to examine the murder weapon nor given a pretrial lineup. However, these issues were not raised below and no request was made by oral or written motion. See *Fleming v. State*, supra.

The State introduced over objection evidence of the murder of the second victim to show scheme, motive, intent or design. The method used was identical in both crimes, and both crimes were a part of a continuing criminal enterprise. The evidence was properly admitted. *McClesky v. State*, supra.

The State was not required to tender an autopsy report of the second victim as the medical examiner testified as to the cause of death.

During the cross examination of appellant's character witness, the district attorney inquired about a crime occurring in Virginia in order to test the witness's knowledge of the reputation of the defendant. Neither appellant nor his counsel objected and in fact appellant argued a reference to this crime to the jury in closing. This

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argument is without merit. *Moulder v. State*, 9 Ga. App. 438 (1911); *Jackson v. State*, supra; *Fleming v. State*, supra.

It is apparent from the brief filed that appellant's counsel had a transcript and the appellant cannot complain he was not furnished an additional copy. See *Mydell v. Clerk, Superior Court of Chatham County*, 241 Ga. 24 (243 SE2d 72) (1978).

Finally, appellant has called attention to the fact that a deputy clerk and not a magistrate had signed his arrest warrants. This argument is without merit. Shadwick v. City of Tampa, 407 U. S. 345 (1972); *Johnson v. State*, 111 Ga. App. 298 (141 SE2d 574) (1965).

*Sentence Review.*

As required by Ga. L. 1973, p. 159 et seq., Code Ann. § 27-2537 (c) (1-3), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, the evidence concerning the crime and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

The jury found the following aggravating circumstances: "The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim." Code Ann. § 27-2534.1 (b) (7).

Under the evidence of this case, the victim was struck on the head with a karate chop and fell over bleeding. She was pulled from the car with such force that her elbow was dislocated. All of these injuries occurred prior to death. The victim, again while still alive, was beaten with a tire jack with such force and savagery that when found her face from the top of the eyes down was completely missing, and parts of her jaw and skull were found within a nine foot radius of the body. The cause of death was *multiple* compound fractures of the skull and face, and evulsion (removal) of the victim's brain. Although it is unknown at what exact time during the beating the victim died, the jury was authorized to find from the evidence, an aggravated battery prior to death in that the victim's

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elbow and face were at a minimum rendered useless. Code Ann. § 26-1305. See *Baker v. State*, 245 Ga. 657 (1980).

The murder was outrageously or wantonly vile, horrible or inhuman in that this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. The victim was not killed instantaneously, she was not a member of the appellant's family, nor was she subjecting him to any emotional trauma. She gave the appellant no reason whatsoever to assault her, and was in no manner threatening. The appellant showed no remorse for the killings and attempted in every manner to hide his crime. Under the evidence of this case, it cannot be argued that the nature of the injuries to the victim was not of the type universally condemned as outrageously or wantonly vile or inhuman. See *Patrick v. State*, supra.

Under the evidence of this case, the aggravated battery was of such a nature as to go to the very core of Code Ann. § 27-2534.1 (b) (7), and the section is constitutionally applied under the evidence in this case. Godfrey v. Georgia, supra, Division three.

We find that the evidence factually substantiates and supports the finding of this aggravating circumstance and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). We have thoroughly reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1978), and *Hawes v. State*, 240 Ga. 327 (240 SE2d 833) (1978). In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support affirmance of the death penalty. Appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

*Judgment affirmed. All the Justices concur.*

Argued March 11, 1980 — Decided June 24, 1980.

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REHEARING DENIED JULY 15, 1980.

Murder, etc. Muscogee Superior Court. Before Judge Followill.

*Richard O. Smith, William Alexander Byars,* for appellant.

*William J. Smith, District Attorney, Arthur K. Bolton, Attorney General, Mary Beth Westmoreland, Staff Assistant Attorney General,* for appellee.

APPENDIX.

*Jackson v. State,* 229 Ga. 191 (190 SE2d 530) (1972); *Owens v. State,* 233 Ga. 869 (214 SE2d 173) (1975); *Chenault v. State,* 234 Ga. 216 (215 SE2d 223) (1975); *Harris v. State,* 237 Ga. 718 (230 SE2d 1) (1976); *Young v. State,* 239 Ga. 53 (236 SE2d 1) (1977); *Potts v. State,* 241 Ga. 67 (243 SE2d 510) (1978); *Patrick v. State,* 245 Ga. 417 (265 SE2d 553) (1980).

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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

| | |
|---|---|
| WILLIAM HENRY HANCE,<br><br>Petitioner,<br><br>-v-<br><br>WALTER D. ZANT, Warden, Georgia Diagnostic & Classification Center,<br><br>Respondent. | HABEAS CORPUS NO. ____ |

PETITION FOR WRIT OF HABEAS CORPUS, FOR A STAY OF EXECUTION, AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

(1) William Henry Hance petitions this court for a writ of habeas corpus pursuant to Ga. Code Ann. §50-127. In support of his petition, he alleges the following:

(I. INTRODUCTION)

(2) William Hance is being wrongfully detained by Walter D. Zant, the Warden of the Georgia Diagnostic & Classification Center in Jackson, Butts County, Georgia, pursuant to convictions and sentences which have been imposed upon him by the State of Georgia in violation of the Constitution and laws of the State of Georgia and the Constitution of the United States.

(II. PRIOR PROCEEDINGS)

(3) William Hance was tried in the Superior Court of Muscogee County on December 11-16, 1978 for murder and for attempted theft by extortion. He was convicted of both charges and was sentenced to death in the electric chair for murder, and to five years imprisonment for attempted theft by extortion.

He appealed to the Supreme Court of Georgia, which affirmed the judgment below. Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). A timely petition for rehearing was denied on July 15, 1980.

(4) William Hance then filed a petition for a writ of certiorari in the Supreme Court of the United States. On December 15, 1980, the Supreme Court denied the petition. Hance v. Georgia, __U.S.__, 49 U.S.L.W. 3443 (U.S., Dec. 16, 1980). A timely petition for rehearing was denied on January 26, 1981. Hance v. Georgia, __U.S.__, 49 U.S.L.W. 3532 (U.S. Jan. 27, 1981).

(5) On February 2, 1981, the Superior Court of Muscogee County set Friday, February 20, 1981 as the date for the execution of William Hance's death sentence.

## (III. RESPECTS IN WHICH PETITIONER HANCE'S RIGHTS HAVE BEEN VIOLATED)

(6) William Hance has been convicted and sentenced to death in violation of Sections 2-101, 2-110, 2-111, 2-113, and 2-114 of the Constitution of 1976 of the State of Georgia and of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States in the following respects:

### (A.) The Arrest and Interrogation Without Probable Cause

(7) The custodial interrogation and eventual arrest of William Hance without probable cause, which resulted directly in the seizure of physical evidence and the obtaining of statements by petitioner Hance introduced by the State during his trial, violated his rights guaranteed by Sections 2-101, 2-111,

and 2-113 of the Constitution of 1976 of the State of Georgia and by the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States.

(8) United States military investigators seized William Hance, removed him to military headquarters, and held him for custodial interrogation for over eighteen hours upon facts -- the disappearance of a local woman and information that Hance had given the woman a ride to a local bar (T. 697-98) -- not amounting to probable cause. As a result of his illegal seizure, authorities obtained statements used against petitioner Hance at his trial as well as items of physical evidence.

(B.) The Violation of Miranda

(9) The failure by United States military investigators to cease custodial interrogation of William Hance after he requested the opportunity to consult with an attorney, and the introduction by the State into evidence of statements and physical evidence obtained following petitioner Hance's unheeded request, violated his rights guaranteed by Sections 2-101, 2-111, and 2-113 of the Constitution of 1976 of the State of Georgia and by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

(10) After United States military investigators seized William Hance and read to him his Miranda rights, he requested the opportunity to speak with an attorney (T. 737, 930). His request was not honored, and statements and physical evidence obtained after this request were admitted into evidence against him at trial.

(C.) The Denial of Access to Counsel

(11) The intentional, knowing or reckless refusal by United States military investigators and Columbus, Georgia police officials to reveal the whereabouts of William Hance to his attorney during Hance's incommunicado interrogation by those officers extending over a period of three days, despite the attorney's persistent efforts to locate his client, violated petitioner Hance's rights, guaranteed by Sections 2-101, 2-111, and 2-113 of the Constitution of 1976 of the State of Georgia and by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

(12) An attorney who had previously represented Wiliam Hance contacted by telephone and visited Columbus police (T. 907-08) and United States military investigators (T. 907-08) when he learned of petitioner Hance's arrest in an effort to reach his client. He was not told where Mr. Hance was being kept by either law enforcement agency, but only learned of petitioner Hance's whereabouts three days later on receiving a postcard from his client (T. 909).

(D.) The Exclusion of Evidence Bearing on Involuntariness

(13) The trial court's refusal to permit the jury to hear testimony by William Hance's attorney concerning petitioner Hance's demeanor and state of mind on the day after the State had obtained a written statement from him, even though the State had deliberately or knowingly denied the attorney access to petitioner Hance prior to that time, and the court's refusal to let the jury hear testimony by William Hance concerning his

willingness during his interrogation to submit to a polygraph examination prevented the jury from making a fair and impartial decision on the voluntariness of petitioner Hance's statements, violating his rights guaranteed by Sections 2-101 and 2-113 of the Constitution of 1976 of the State of Georgia and by the Fifth and Fourteenth Amendments to the Constitution of the United States.

(14) The attorney who tried to locate William Hance during his incommunicado interrogation was called to the stand to testify to petitioner Hance's demeanor and physical circumstances when he was finally located the day following the interrogation (T. 909-11) and concerning his prior knowledge of Hance's reactions to stress (T. 912-14), both factors related to the issue of the voluntariness of his statements during the interrogation period. The trial court refused to permit any evidence on either fact (T. 910, 914). William Hance attempted to demonstrate his efforts to cooperate with authorities and his belief in his own non-involvement in the crime by developing before the jury testimony that he had requested a polygraph examination from investigating officers (T. 731-34). The trial court refused to permit petitioner Hance to give that testimony (T. 747).

(E.) The Unwarranted Introduction of Portions of the Victim's Corpse into Evidence

(15) The State's introduction into evidence during William Hance's trial of portions of the victim's corpse, when adequate photographic depictions of these items had already been introduced was needlessly inflammatory, violating petitioner

Hance's rights guaranteed by Sections 2-101 and 2-114 of the Constitution of 1976 of the State of Georgia and by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(16) Although several closeup photographs of the scene of the crime and the condition of the victim's body were admitte into evidence (T. 517-19; State's Ex. 7-17), the trial court neve theless permitted the State to introduce into evidence actual pieces of the victim's jawbone and skull (T. 875; State's Ex. 22-26).

(F.) The State's Use of a Prior Arrest

(17) The State's deliberate act in repeatedly bringing to the attention of the jury certain information concerning a prior arrest of William Hance, as to which no conviction had ev been obtained violated his rights guaranteed by Sections 2-101 and 2-114 of the Constitution of 1976 of the State of Georgia and by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(18) During cross-examination of a witness for William Hance, the State -- adopting the discredited "Did you know . . ." form -- asked the witness whether she knew that petitioner Hanc had been arrested or indicted (but apparently not convicted) on September 3, 1968 in Norfolk, Virginia for "unlawfully and feloniously and maliciously strik[ing] and wound[ing] a Shirley Humphrey with an iron pipe with intent to maim, disable, disfigure or kill." (T. 926). The State referred again to the unproven charge during its closing argument at the guilt phase (T. 1074) and the sentencing phase (T. 1144) of petitioner

Hance's trial.

(G.) The Needlessly Extensive Evidence of Another Crime

(19) The State's introduction into evidence during William Hance's trial of detailed testimony and physical evidence concerning another "similar crime" allegedly committed by petitioner subsequent to that involved in this case, and the State's repeated reference to that other crime, was so needlessly prejudicial and inflammatory that it violated petitioner's rights guaranteed by Sections 2-101 and 2-114 of the Constitution of 1976 of the State of Georgia and by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(20) Over continued objection by the defense (T. 414, 437-40, 454-56, 631-33, 636, 669-70) the State introduced unnecessarily detailed and inevitably prejudicial testimony (T. 437, 607-670) and physical evidence, including photographs (T. 669-72) concerning a crime committed subsequent to that involved in this case.

(H.) The Trial Court's Unconstitutional Instructions on Presumptions

(21) The trial court's instructions to William Hance's jury at the close of the guilt phase of his trial, which permitted the jury to find essential elements of the crime in reliance upon certain Georgia statutory and common law presumptions, shifted the burden of proof to petitioner Hance, and violated petitioner Hance's right to proof by the State of every element of the crime beyond a reasonable doubt, guaranteed by Section 2-101 of the Constitution of 1976 of the State of Georgia and by the Fourteenth Amendment to the Constitution of the United States.

(22) The trial court instructed William Hance's jury that "when witnesses appear and testify they are presumed to speak the truth and are believed by the jury unless it is established that they are unworthy of belief" (T. 1084) and that "the acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts." (T. 1093).

(I.) The Trial Court's Refusal to Give A Specific Venue Charge

(23) The trial court's refusal, in a case in which the issue of venue was crucial, to grant the request of William Hance's attorney for the jury to receive an express charge at the close of the guilt phase that venue was an element of the crime, violated petitioner Hance's right to a verdict based upon proof by the State of every element of the crime beyond a reasonable doubt, guaranteed by Section 2-101 of the Constitution of 1976 of the State of Georgia and by the Fourteenth Amendment to Constitution of the United States.

(24) Although the trial court had indicated that it would expressly instruct William Hance's jury on the element of venue (T. 1103-04), it did so only by charging the jury that "if you find andbelieve . . . that the defendant did in the County of Muscogee, State of Georgia, with malice aforethought, kill" etc. even though the issue of venue was crucial to this case (T. 493-500), since if the victim were killed several feet closer to the adjacent federal right-of-way from where the State alleged she

was killed, jurisdiction over the crime would have rested with United States military authorities, not the State of Georgia.

(J.) The Exclusion of Relevant Mitigating Testimony

(25) The trial court's refusal to permit William Hance to testify during the sentencing phase of his trial concerning relevant mitigating evidence violated his rights guaranteed by Sections 2-101 and 2-114 of the Constitution of 1976 of the State of Georgia and by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(26) William Hance took the stand during the penalty phase of his trial among other things to insist that, despite the jury's verdict, he did not remember committing the crime (T. 1124-26). The State successfully objected to the introduction of this potentially significant mitigating testimony (T. 1128).

(K.) The State's Arguments to the Jury

(27) The State's opening argument to the jury, its closing argument at the close of the guilt phase, and its closing argument at the sentencing phase of William Hance's trial, which were characterized by repeated references to extra-record evidence, by references to the personal beliefs and opinions of the prosecutor, and by appeals to passion and prejudice, violated petitioner Hance's right guaranteed by Sections 2-101 and 2-114 of the Constitution of 1976 of the State of Georgia and by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(28) During opening argument, the State referred expressly to the jury not only to evidence it expected to present during

the course of the trial but to "other evidence that I'm not at liberty to go into at this time (T. 418). During closing argument at the guilt phase, the State suggested that petitioner Hance was an animal (T. 1058). The prosecutor, during the guilt and sentencing closings, made extensive reference to his own personal life as an FBI agent (T. 1061), expressed his personal opinions on why people confess (id.), told the jury how infrequently his office decided to recommend a death sentence (T. 1137-38), stated that he was personally shocked and offended by defense counsel's closing argument (T. 1149-50), expressed his personal belief that a death sentence was a deterrent (T. 1151), assured the jury that they would not bear the personal responsibility for their decision to impose a death sentence (T. 1154-55), suggested that if petitioner Hance received a life sentence he might escape, (alluding to James Earl Ray's escape attempt) (T. 1157), suggested that petitioner Hance would pose a threat to Georgia prison guards and other inmates (T. 1157-58), and intimated that imposing a death sentence was the moral equivalent to serving one's country in time of war (T. 1158-60).

(L.) The Ineffective Assistance of Counsel During the Sentencing Phase

(29) The attorneys appointed to represent William Hance as co-counsel failed to render effective assistance to him during the sentencing phase of his trial, in violation of his rights guaranteed by Sections 2-101 and 2-111 of the Constitution of 1976 of the State of Georgia and by the Sixth and Fourteenth Amendments to the Constitution of the United States.

(30) William Hance represented himself during his trial, but the Public Defender was appointed as co-counsel (Motion H.T. 5-12). During the guilt phase, it became clear that petitioner Hance was not skilled at trial practice, but instead was sometimes confused and lacking in knowledge of capital procedures (e.g., T. 598, 749). Although a great deal of mitigating evidence could have been developed by co-counsel even without petitioner Hance's assistance for use during the sentencing phase, no such evidence was developed or presented by counsel

(M.) The Physical Circumstances of the Trial

(31) The attempt to hold William Hance's trial in a new courtroom without proper acoustics, which resulted in repeated complaints from all present, including the jury, that they simply could not hear petitioner and other participants in the trial, violated petitioner Hance's rights guaranteed by Section 2-101 of the Constitution of 1976 of the State of Georgia and by the Fourteenth Amendment to the Constitution of the United States.

(32) William Hance's case was the first case tried in the new courtroom in the Superior Court of Muscogee County (T. 397-98). The court (T. 398, 597) and the jury (e.g., T. 485, 521-22) repeatedly complained that the lack of a microphone or any audio systems and the acoustics of the room kept them from hearing petitioner Hance and other witnesses.

(IV. PREVIOUS PROCEEDINGS THAT PETITIONER HAS UNDERTAKEN TO SECURE RELIEF)

(33) Except as set forth in paragraphs 3 and 4 of this

petition, William Hance has undertaken no other proceedings to secure relief from his convictions and sentences.

(V. PRAYER FOR RELIEF)

WHEREFORE, William Hance respectfully prays for an order:

(i) staying his execution pending final disposition of this matter;

(ii) permitting him to file this petition without prepayment of costs, and to proceed in forma pauperis;

(iii) directing a writ of habeas corpus to respondent, requiring him to appear and answer the allegations of this petition;

(iv) according petitioner Hance an evidentiary hearing on the allegations of his petition;

(v) after a full and complete hearing, relieving him of his unconstitutional convictions and sentences; and

(vi) allowing him such other, further and alternative relief as may seem just, equitable and proper.

Respectfully submitted,

STEVEN A. KERMISH
1314 Rhodes Haverty Building
134 Peachtree Street N.W.
Atlanta, Georgia 30303
(404) 525-0457

ATTORNEY FOR PETITIONER

Dated: February 17, 1981

STATE OF GEORGIA

COUNTY OF FULTON

VERIFICATION

Before the undersigned, an officer duly authorized by law to administer oaths, appeared Steven A. Kermish , who, being duly sworn, did depose and say as follows:

I am a member in good standing of the Bar of the State of Georgia;

I am the duly authorized attorney for WILLIAM HENRY HANCE, the Petitioner herein, authorized to prepare and verify the within and foregoing Petition;

I have read the within and foregoing Petition and know the contents thereof;

I know of my personal knowledge that all the facts stated therein are true, except such as are stated on information and belief;

As to the subject matter, I believe the Petition to be true; and,

I signed this Verification on behalf of the Petitioner because the within and foregoing Petition deals chiefly with matters of law and legal inferences to be drawn from facts of record, with respect to which I as an attorney have more knowledge than Petitioner, and for the further reason that the Petitioner, whose execution date is set for February 20, 1981 , is located at the Georgia Diagnostic and Classification Center at Jackson, Georgia, and there is insufficient time to secure this personal Verificati

STEVEN A. KERMISH

ATTORNEY FOR PETITIONER

Sworn to and subscribed before me,
this the _____ day of _____,
1981.

Notary Public

My Commission expires:

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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

| | | |
|---|---|---|
| WILLIAM HENRY HANCE, | : | |
| Petitioner, | : | |
| v. | : | CIVIL ACTION FILE NO. 4967 |
| WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, | : | AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS |
| Respondent. | : | |

Comes now WILLIAM HENRY HANCE, Petitioner in the above-styled action, and Amends his Petition for Writ of Habeas Corpus as follows:

1.

Petitioner was denied effective assistance of counsel in that his trial counsel failed to file a Motion to Suppress his confession pursuant to Brown v. Illinois, 1422 U.S. 590, 95 S.Ct. 2254, _____ (1975); failed to produce an expert witness to contest the issue of venue; failed to move for a psychiatric evaluation to determine Petitioner's competency; failed to present witnesses during the mitigation phase of Petitioner's criminal trial.

2.

Petitioner contends that the Court erred in allowing his confession into evidence because it was the result of an illegal seizure and that the mere giving of the Miranda warnings was insufficient to dissipate the taint of said illegal seizure. Brown v. Illinois, 1422 U.S. 590, 95 S.Ct. 2254, (1975).

3.

The Court erred in charging the jury as to the aggravating circumstances which were used to justify the imposition of the death penalty, especially as to the elements of aggravated battery.

4.

The Court erred in not determining Petitioner's competency to assist in his own defense when it failed to follow the procedure set out in Faretta v. California, 95 S.Ct. 2525 (1975).

5.

The death penalty is in fact administered and applied arbitrarily, capriciously, and whimsically in the State of Georgia; and Petitioner was sentenced to die, and will be executed, pursuant to a pattern and practice of wholly arbitrary and capricious infliction of that penalty in violation of his rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(a) The Supreme Cout of the United States upheld the Georgia capital punishment statutes "on their face" only upon the assumption that the procedures mandated by the statutes would assure that sentences of death are not wantonly or freakishly imposed. Gregg v. Georgia, 428 U.S. 153, 198 (1976). As those statutes have been applied, however, death sentences in Georgia have in fact been imposed in an arbitrary and capricious manner.

(b) Georgia cases similar to that of Petitioner in many respects, including both the nature and circumstances of the offense, the age, prior record, relative culpability, and life and character of the accused have resulted in lesser punishments than death.

(c) Georgia cases more aggravated than that of Petitioner in many respects, including both the nature and circumstances of the offense and the age, prior record, relative culpability, and life and character of the accused have resulted in lesser punishments than death.

(d) There is no rational, constitutionally permissible way of distinguishing the few cases in which the death penalty has been imposed from the many cases in which it has not been imposed.

6.

Petitioner's death is being exacted pursuant to a pattern and practice of Georgia prosecuting authorities, courts, juries and Governors to discriminate on grounds of race, sex and poverty

in the administration of capital punishment. For this reason, the imposition and execution of Petitioner's death sentence under Georgia law and practice violate the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(a) The death penalty in the United States and in the State of Georgia has been discriminatorily imposed against males, poor persons and defendants accused of killing Caucasians.

(b) Petitioner's death sentence was imposed pursuant to the pattern of racial, economic and sexual discrimination set forth in paragraphs (a) and (b) above.

7.

The theoretical justifications for capital punishment are groundless and irrational in fact, and death is thus an excessive penalty which fails factually to serve any rational and legitimate social interests that can justify its unique harshness, in violation of Petitioner's rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(a) The death penalty provided by Georgia Law violates the principle that a criminal sanction "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976).

(b) Executions do not have an identifiable deterrent effect. As the Georgia State Department of Offender Rehabilitation acknowledged in a November, 1973 study entitled Capital Punishment in Georgia: An Empirical Study 1943-1965, "Despite the fact that Georgia used the death penalty more often than any other state in the country, its homicide rate was also the highest in the nation. This suggests that

the death penalty is not effective as a deterrent." Study at 451 (emphasis added).

(c) Executions set socially sanctioned examples of, and provide an inducement to, violence.

(d) Public sentiment for retribution is not so strong as to justify use of the death penalty.

(e) There is no penal purpose served by execution which is not more effectively or efficiently served by life imprisonment.

8.

Petitioner's trial jury was unrepresentative and biased in favor of the prosecution on the issue of Petitioner's guilt or innocence of the crime with which he was charged and biased on the issue of sentence in violation of his rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

(a) Social science research demonstrates that jurors without conscientious or religious scruples against capital punishment constitute an element of the community which, as a whole, tends to be biased in favor of the prosecution in resolving issues of guilt or innocence.

(b) Exclusion of jurors because of their conscientious or religious scruples resulted in a jury in Petitioner's case which was conviction-prone and incapable of rendering a fair and impartial verdict on guilt or innocence.

WHEREFORE, Petitioner prays that his Writ be granted and that his conviction and sentence be reversed.

Respectfully submitted,

KERMISH, LABOVITZ, MARCUS, BRAZIER & ROSENBERG

By _____
Stephen A. Kermish
Attorney for Petitioner

1314 Rhodes Haverty Building
134 Peachtree Street
Atlanta, Georgia 30303
404/525-0457

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

| | | |
|---|---|---|
| WILLIAM HENRY HANCE, | : | |
| Petitioner, | : | |
| | : | CASE NO. 4967 |
| v. | : | |
| WALTER D. ZANT, WARDEN, | : | |
| Respondent. | : | |

# MEMORANDUM IN SUPPORT OF WRIT OF HABEAS CORPUS

MR. STEPHEN A. KERMISH
Attorney for Petitioner
1314 Rhodes Haverty Building
134 Peachtree Street
Atlanta, Georgia 30303
404/525-0457

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## ARGUMENT I

Petitioner, WILLIAM HANCE, contends that all statements and acts by him were the result of and a product of a custodial interrogation and as such, should be suppressed pursuant to both the Fourth and Fifth Amendments of the United States Constitution. There can be no doubt that a "request to come to a police station may easily carry an implication of obligation, while the appearance itself, as clearly stated to be voluntary, may be an awesome experience for the ordinary citizen." Dunaway v. New York, 99 S.Ct. 2248, footnote 6 (1979). Defendant recognizes that the question of custody is often difficult to ascertain as is the concept of when a seizure has taken place. As stated in United States v. Cavello, 507 F.2d (5th Cir.) 1975. The factors may be properly analyzed are (1) probable cause to arrest; (2) subjective intent of the police; (3) subjective belief of the defendant; and (4) focus of the investigation.

Petitioner contends that his situation is analogous to the facts in Dunaway. There, petitioner was taken into custody, although he was not told he was under arrest. Dunaway, further, was placed in an interrogation room as was HANCE in the instant case. In Dunaway, the police did give the petitioner Miranda warnings and argued that, because of such a warning, the confession given by Dunaway was voluntary. In Dunaway, the Supreme Court recognized that the Miranda warnings alone were insufficient to attenuate or dissipate the initial illegal detention and that they could not be considered as intervening events to break the connection between the illegal detention and his confession. As the Supreme Court stated, if Miranda warnings by themselves were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially deleted... arrest made without warrant, without probable cause, or questioning or investigation with the occurrence or the knowledge that evidence derived therefrom could well be made admissible at trial by simple, expedience of giving Miranda warnings."

As observed by the Dunaway Court, the satisfying of Fifth

Amendment safeguards would only be a threshold condition of the Fourth Amendment analysis. To admit petitioner's confession in such a case would allow law enforcement officers to violate the Fourth Amendment with impunity safe in the knowledge that they could wash their hands in the procedural safeguards of the Fifth.

The Cavollo Court has defined custodial interrogation as questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way. It appears here that Petitioner, HANCE, was unquestionably in custody not only at the CID Headquarters, but at the time he entered the Captain's office. There, he was confronted with two investigators as well as his commanding officer. Furthermore, he was told that he was a suspect and that the investigation had focused on him. Certainly, under those circumstances, no man would feel that he was free to terminate the conversation and merely walk away. It is also axiomatic that, while HANCE went with the officers without a struggle, one cannot consent to accompany agents who have already seized him.

A review of the records indicates that Petitioner, HANCE, was arrested because he had been seen with one of the victims (hearsay testimony) and a tape of a phone conversation was played for HANCE'S commanding officer. HANCE'S company commander and first sergeant listened to the tape recording and gave the opinion that they felt it was HANCE'S voice. (T. 19, 20, 21.) Because HANCE had been seen with one of the victims and the phone call tape sounded like HANCE'S voice, the investing officers made the determination that probable cause existed to arrest Petitioner. (T. 22). Thus, it is seen that the investigating officers, not a neutral or detached magistrate, made the determination of probable cause to arrest HANCE.

This determination was made despite the fact that the Judge Advocate Corps also makes the determination as to probable cause and decides whether or not an individual should be detained. (T. 49). Therefore, HANCE contends that his arrest was illegal because it was not made by a neutral and detached magistrate, but

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rather by investigating officers. Coolidge v. New Hampshire, 403 U.S. 443; State v. Guhl, 140 Ga. App. 23.

HANCE further contends that no probable cause existed for his arrest. The Supreme Court of the United States has observed that the Fourth Amendment proscription against unreasonable searches and seizures applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. United States v. Brignoni-Ponce, 422 U.S. 873 (1975). The Supreme Court has determined that a person has been seized within the meaning of the Fourth Amendment only if and in view of all the circumstances surrounding the incident a reasonable person would have believed that he was not free to leave. United States v. Mendenhall, 100 S.Ct. at 1877.

"The exclusionary rule would be substantially deleted ... arrest made without warrant or without probable cause, or questioning or investigation would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by simple expedience of giving Miranda warnings." Dunaway, supra. As observed by the Dunaway Court, the satisfying of Fifth Amendment safeguards would only be a threshold condition of the Fourth Amendment analysis. To admit Petitioner's confession in such a case would allow law enforcement officers to violate the Fourth Amendment with impunity safe in the knowledge that they could wash their hands of the procedural safeguards of the Fifth.

## ARGUMENT II

Petitioner HANCE contends that he was denied his right to a fair trial by reason of ineffective assistance of counsel. There can be no doubt that the Sixth Amendment to the Constitution of the United States guarantees representation by competent counsel and that competent counsel means counsel likely to render and rendering reasonably effective assistance. This is true whether the case involves appointed or retained counsel. Cuyler v. Sullivan, 27 Cr. L. Rptr. 3100 (1980).

In order to determine whether or not counsel has been effective, certain questions must be determined. One of the basic issues is whether or not defense counsel investigates all substantial defenses available to the defendant and asserts them in a proper and timely manner. Reece v. Georgia, 350 U.S. 85 (1955). The Supreme Court also stated in United States v. Ash, 413 U.S. 300 (1973), that counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that adversary system requires that all available defenses are raised. The fact that the Dunaway argument as set out above was not raised at Petitioner's trial is clear indication that counsel was ineffective.

Furthermore, a reading of transcript discloses that no witnesses were called on behalf of Petitioner HANCE, either at the trial or in the mitigation portion of the trial. It has been stated that a defense attorney who has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance has failed his client and is therefore ineffective no matter that he exercised the utmost skill at trial. Moore v. United States, 432 F.2d 730 (3rd Cir., 1970). A federal judge in the Northern District of Texas has described such conduct in the following manner: "The lawyer who does not probe, does not inquire, does not seek out all facts relevant to his client's case, is prepared to do little more than stand still at the time of trial. Smotherman v. Beto, 276 F.2d 579 (N. Dist. of Texas 1967). Because counsel for Defendant did not assert all legal defenses ava lable at trial nor did he trouble himself with subpoenaing witnesses or arranging for

their attendance for his client, he has been rendered totally ineffective.

## ARGUMENT III

Violation of Miranda and Denial of Access to Counsel (Paragraphs 9 - 14 of Habeas Corpus Petition

After United States military investigators seized Petitioner and read to him his Miranda rights, Petitioner requested the opportunity to speak with an attorney. (T. 737, 930). His request was not honored, and statements and physical evidence obtained after this request were admitted into evidence against him at trial.

During Petitioner's incommunicado interrogation by military authorities and police officials, extending over a period of three days, Petitioner's attorney made repeated attempts to learn the location of his client and speak with him concerning the pending charges. (T. 907 - 909). These attempts were thwarted by police and military officials who sent the attorney on a circular wild-goose chase, refusing to tell him the true location where Petitioner was being held. (T. 907 - 909).

Statements obtained after an accused person has requested to speak with an attorney are inadmissible under the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel. Edwards v. Arizona, __ U.S. ____, 29 Cr. L. Rptr. 3037 (May 18, 1981).

Further, notwithstanding any judgment of the credibility of Petitioner's testimony, the unconscionable acts of police and military officials in denying Petitioner's counsel access to his client, renders all statements obtained pursuant to police and military interrogation inadmissible.

Isolation of an accused person from counsel renders any subsequent statements involuntary. Chambers v. Florida, 309 U.S. 227, 238 (1940). We "can't blind ourselves to what experience teaches," incommunicado interrogation is often used in obtaining an involuntary confession. Haynes v. Washington, 3737 U.S. 503, 514 (1963). In Darwin v. Connecticut, 391 U.S. 346, 347, 350 (1968), the Court found as the key factor rendering a confession involuntary the refusal by law enforcement officials to allow counsel to see the accused during interrogation. See, also, Spano v. New York, 360

U.S. 315, 318, 322-3 (1959).

Recently, in Fare v. Michael C., 442 U.S. 707, 719 (1979), the Court recognized the critical position of counsel during custodial interrogation as a Fifth Amendment right.

Because a lay person "may not be aware of the precise scope, the nuances and boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advice from someone who is trained and skilled in the subject matter." Maness v. Meyers, 419 U.S. 449 (1975); Smith v. Estelle, __ U.S. ___, 29 Cr. L. Rptr. 3031 (May 18, 1981).

The trial court at Petitioner's trial further exacerbated the error and deprived Petitioner the opportunity to present the crucial issue of the voluntariness of his confession to the jury where the trial court refused to allow Petitioner's attorney to testify concerning Petitioner's demeanor and physical circumstances when he was finally located (T. 909-11) and concerning the attorney's prior knowledge of Petitioner's reactions to stress (T. 912-914).

## ARGUMENT IV

### Unwarranted Introduction of Portions of the Victim's Corpse Into Evidence (Paragraphs 15-16 of Habeas Corpus Petition

At Petitioner's trial, the State was allowed to introduce as evidence portions of the victim's corpse. Although several closeup photographs of the scene of the offense and the condition of the victim's body were admitted into evidence (T. 517-519), the State, nevertheless, introduced into evidence actual pieces of the victim's jawbone and skull (T. 875).

This gruesome and inflammatory evidence was not offset by any legitimate evidentiary purpose; any evidentiary value of the condition of the deceased's body could be more than adequately served by the photographs. There was no probative value to pieces of an already decomposed body; the introduction of this evidence can only be seen as an attempt to prejudice the jury.

Under common law, the introduction of inflammatory evidence was prohibited where its probative value was outweighed by its prejudicial effect. E.g., Maxwell v. United States, 368 F.2d 735, 739-40 (9th Cir. 1966); Holcomb v. State, 130 Ga. 154, 155 (1973).

In capital cases, this common law prohibition is raised to a constitutional level by the requirement that the death sentence be based on reason, rather than caprice and emotion. Gardner v. Florida, 430 U.S. 349 (1977).

## ARGUMENT V

Jury Charge on Burden of Proof on Malice and Intent
(Paragraphs 21-22 of Habeas Corpus Petition)

The Georgia Murder Statute is set out in Ga. Code Ann. §26-1101. Under this statute, malice and intent are essential elements of the crime of murder and, as such, must be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Davis v. State, 237 Ga. 279, 227 S.E. 2d 249 (1976).

The Court's charge to the jury in Petitioner's case on the essential element of intent was as follows:

> "... the acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. (T. 1093).

Since intent is an element of the offense of murder, "it follows that the trial court may not withdraw or prejudice the issue by instruction that the law raises a presumption of intent from an act." Morisette v. United States, 342 U.S. 246, 274 (1952). See, also, United States v. United States Gypsum, 438 U.S. 422 (1978). A jury instruction is invalid when it creates a presumption which acts to shift the burden of persuasion of an element of the crime away from the prosecution and acts to place the burden of disproof of the element upon the accused. Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstrom v. Montana, 442 U.S. 510 (1979).

In Sandstrom v. Montana, supra, the Court found defective a jury charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts," 422 U.S. at 513, in that it violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

Equally defective is the charge in Petitioner's case.

Numerous challenges to burden shifting charges similar to that in Petitioner's case caused the United States Fifth Circuit Court of Appeals to direct that:

> "No district court in this circuit shall include in its charge to the jury an instruction on proof of intent which is in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence." United States v. Chiantese, 560 F.2d 1244, 1255 (5th Cir. 1977).

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The fact that the jury was instructed on the requirement that the State prove the offense beyond a reasonable doubt does not affect the invalidity of the charge. In Sandstrom v. Montana, supra, the Court found that, given the common definition of "presume" as "to suppose to be true without proof," and given the lack of any qualifying instructions by the trial court as to the legal effect of the presumption as given, there was a possibility that the jury may have interpreted the instruction in either of two ways:

> "First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considered greater than 'some' evidence -- thus effectively shifting the burden of persuasion on the element of intent."
> 442 U.S. at 517 (emphasis in original)

In Petitioner's case as in Sandstrom, no instructions were given to the jury defining the classification, nature or effect of presumptions in criminal proceedings. Also, the trial court failed to instruct the jury on the quantum of proof necessary to accomplish the rebuttal.

Unlike Sandstrom, Petitioner has been sentenced to death. This requires that this issue be viewed in a manner insuring the highest standards of due process in order to satisfy the Eighth and Fourteenth Amendments. See, Gardner v. Florida, 439 U.S. 239 (1977). The confusion which was inevitably caused by the trial court's charge directly contradicts the statement in Gregg v. Georgia, 428 U.S. 153 (1976) that:

> "Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a law suit. It would be virtually unthinkable to follow any other course ... It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."

## ARGUMENT VI

### Improper State's Arguments to the Jury (Paragraphs 27-28 of Habeas Corpus Petition

In the State's opening argument to the jury, its closing argument at the guilt phase and its closing argument at the sentencing phase, the prosecutor made numerous inflammatory remarks, expressed his personal opinion on issues, referred to facts not in evidence and made substantial misstatements of law.

During closing argument at the guilt phase, the State suggested that petitioner HANCE was an animal (T. 1058). The prosecutor, during the guilt and sentencing closings, made extensive reference to his own personal life as an FBI agent (T. 1061), expressed his personal opinions on why people confess (id), told the jury how infrequently his office decided to recommend a death sentence (T. 1137-38), stated that he was personally shocked and offended by defense counsel's closing argument (T. 1149-50), expressed his personal belief that a death sentence was a deterrent (T. 1151), assured the jury that they would not bear the personal responsibility for their decision to impose a death sentence (T. 1154-55), suggested that if petitioner HANCE received a life sentence he might escape, (alluding to James Earl Ray's escape attempt) (T. 1157), suggested that petitioner HANCE would pose a threat to Georgia prison guards and other inmates (T. 1157-58), and intimated that imposing a death sentence was the moral equivalent to serving one's country in time of war (T. 1158-60).

What the law condemns is "the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence." Ruffin v. State, 243 Ga. 95 (1979); Floyd v. State, 143 Ga. 286 (1915).

"Prosecuting attorneys are no longer permitted to indulge themselves, or their audiences, in unrestrained abusive histrionics, giving their personal evaluations of what a low-down fellow the defendant really is," United States v. Windom, 510 F.2d 989, 994 (5th Cir. 1975).

The likelihood that the prosecutor's name-calling adversely influenced the jury has been recognized. As the Court explained in

Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969), the use of uncomplimentary names, " ... is especially likely to stick in the minds of the jury and influence its deliberations."

Expression of a personal belief is only tolerated when it is supported by the evidence at trial, United States v. Rodriguez, 585 F.2d 1234, 1243 (5th Cir. 1978); otherwise, implicit in the assertion of a personal belief is the fact that the prosecutor has based his opinion on something other than the record, Gradsky v. United States, 373 F.2d 706, 710 (5th Cir. 1967).

The prosecutor's expressed concern for the future of the judicial system if Petitioner did not receive the death sentence and the prosecutor's expressed opinion that the imposition of the death sentence was the moral equivalent of war exceeded the bounds of proper argument and was nothing more than inflammatory exaggeration. "It is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted, it will be impossible to maintain 'law and order' ..." United States v. Barker, supra, at 1025.

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## ARGUMENT VII

Exclusion of Relevant Mitigating Testimony
(Paragraphs 25-26 of the Habeas Corpus Petition

WILLIAM HANCE took the stand during the penalty phase of trial among other things to insist that he did not remember committing the crime. Petitioner's counsel also attempted to elicit Petitioner's testimony concerning his mental state on the day of the offense (T. 1124-1127). The State successfully objected to the introduction of this potentially significant mitigating testimony on the grounds that Petitioner's mental state had not previously been raised as an issue and there was no expert testimony on Petitioner's mental state. (T. 1128).

As the United States Supreme Court held in Lockett v. Ohio, 438 U.S. 586, 604 (1978):

> " ... we conclude that the sentences in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Clearly, Petitioner's perceptions of his mental state at the time of the offense would be important to a jury determining the appropriate punishment. In this case, the jury sentenced petitioner to death without being allowed the benefit of this information.

## ARGUMENT IX

Faretta v. California Violation

(Paragraph 4 of Amendment to Petition

At Petitioner's trial, the trial court allowed Petitioner to act as co-counsel (T. 11-27-78 at p. 11).

In Faretta v. California, 422 U.S. 806 (1975), the United States Supreme Court held that an accused person has the right of self-representation in a criminal proceeding against him. However, the Court also stated that, before an accused person be allowed to represent himself, the trial court should insure that the accused person "knowingly and intelligently forego" "the traditional benefits associated with the right to counsel." Faretta v. California, supra, at 835. It is the trial court's duty to make the defendant aware of the dangers and disadvantages of self-representation. Id.

That was clearly not done in this case. Although the trial court questioned Petitioner concerning the decision to proceed as co-counsel (T. 11-27-78 at pp. 7-11), the trial court never made Petitioner aware of the dangers and disadvantages of self-representation.

Further, although a psychological evaluation was made of Petitioner, no evidence from this evaluation was presented for examination and cross-examination before the court. Surely, the facts and circumstances of the offense charged should have created some doubts concerning Petitioner's ability to act as co-counsel in the mind of the trial court and led the trial court to hear some evidence on competency before a decision was made.

Doubts about Petitioner's ability to act as co-counsel surely should have been raised by the first words out of Petitioner's mouth after he was allowed to proceed as co-counsel:

"Mr. Hance: Your honor, I have a question, sir?

The Court: With respect to this motion? Go ahead.

Mr. Hance: If that confession is proved not to be mine, will I be acquitted?"

(T. 11-27-78 at p. 12).

No. 81 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

---

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

---

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY,
STATE OF GEORGIA

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# APPENDICES TO PETITION
VOLUME II

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LEONARD M. MARKS
Counsel of Record for Petitioner
595 Madison Avenue
New York, New York 10022
(212) 935-9200

MARTIN R. GOLD
HOWARD L. WIEDER
PAUL V. LiCALSI
JANE G. STEVENS
595 Madison Avenue
New York, New York 10022

Attorneys for Petitioner

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## LETTER ONE

"March 1, 1978. To Chief of Police. Dear Sir:

We are an organization composed of seven members. I'm writing this letter to inform you that we have one of your Columbus women captive, her name is Gail Jackson. Since that coroner said that the strangler is black, we decided to come here and try to catch him or put more pressure on you. I see now more pressure is needed. At this point Gail Jackson is still living. If that strangler is not caught by 1 June 1978, you will find Gail Jackson's body on Wynnton Road.

"If he's still not caught by 1 September 1978, the victims will double. This is the break that we have been looking for. Tell that coroner thanks a lot. From now on black women in Columbus, Georgia will be disappearing until the strangler is caught. Don't forget that date, Gail Jackson's life depends on it. From now to 1 June Gail Jackson is with us. You better answer us somehow, T.V. or radio. If we don't hear some type of reply in two days we will take it as though you don't care. If we take it that way Gail Jackson will be executed. You have until Sunday for a reply. Don't think we are bluffing. Better yet, I'll give you until midnight Monday, until Sunday. Yours truly. You have until midnight Monday for a reply. P.S. We are called the: Forces of Evil, we are an organization with an organization. By the way, anyone can get a hold of military writing equipment." (Tr. 428-29).*

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* The text of this, and the other letters that follow, are reprinted here as read into the record by the Police Chief. The handprinted letters, containing numerous grammatical and spelling errors, are also included in this Appendix.

LETTER TWO

March 7, 1978

THE CHAIRMAN OF ALL THE FORCES

"The Forces of Evil", F.O.E. custody concerning Gail Jackson's imprisonment, 28 February 1978.

To Chief of Police, Columbus Police Department, Columbus, Georgia 31902. Dear Chief: You were informed once before of the person concerned. We also gave you a deadline which was 1 June 1978. We also told you to respond to us either through T.V. or radio. I see now that you think that we are bluffing. I can't see how you would think something like that with someone's life. You see, Chief, we are an organization within an organization. This is the last letter that you will receive from us. I took this matter of your actions to the committee. I am, of course, the Chairman. The rest of the Forces wanted Gail executed since there was no reply from you. But I ruled that out and postponed her execution until June 1, 1978. By that time, if the stocking strangler is not caught, Gail Jackson will be executed. Every three months after that another black woman will be taken and executed. There's two ways you could prevent this: one, catch and convict the stocking strangler; two, get ten thousand dollars to us by 1 June 1978. So you see you can get her back alive. Maybe they haven't reported her missing yet. But they will, you can be sure of that. We got her 28 February 1978 at 11:38 p.m. We still have her at this time. It will be best on your part to correspond with us or she will die. She's being fed and taken care of just like if she were at home. She will receive this treatment until June 1, 1978, so her life is in your hands. If you think that we are bull-shitting keep this letter on file until she will be reported missing, then if you wait too long Gail will be executed. You should receive this letter by Friday, so on T.V. or radio no later than 11:00 p.m. Friday night we had better hear something from you or we won't wait until June 1, 1978 to execute Gail Jackson, because by you not talking to us that's telling us you don't care. Please, for her sake, answer us.

The Members: 1) The Chairman
2) Secretary (Man)
3) Cremator
4) Executor No. I
5) Executor No. II

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LETTER TWO continued

6) Contractor
7) Seek out Man. (Person or Man Who Contacts Condemned People).

(On Back, Please).

"Don't think that we are bluffing we are an organization within an organization. We are an organization that makes our own laws and rules and punishments. Please help Gail Jackson live. She's only twenty-one years old. She will be twenty-two in September. I'm the one that's keeping her alive, but the rest of the forces wants her executed. Please let us hear from you no later than 11:00 p.m. Friday night. We will not write to you anymore. Chief, this is no prank or joke, so don't take it that way (please). Can't you see I, the chairman, want Gail to live? We will continue on getting black women here in Columbus until the stocking strangler is caught."

"The Forces of Evil

We are here in Columbus, Ga.

We came from Chicago, Ill.

We are here to make justice.

P.S. Thank that coroner for saying the strangler is black. We are patrolling, also, but you just don't know us. We better hear something from you no later than 11:00 P.M. Friday night or we won't wait until June 1, 1978. I hope that you will make the right decision. Good luck. Signed." (Tr. 430-33; State's Exh. 2).

LETTER THREE

FORCES OF EVIL

March 25, 1978

F. O. E.

This is in reference to that column that you wrote about us in the newspaper. So you think that this is a hoax, believe me, this is no hoax. To prove it to you, we have captured another one of your Columbus, Ga. black women. Her name is Irene. We don't know her last name, she refused to tell us. Now, we have Gail Jackson and Irene. Since you people think this is a hoax, Gail Jackson will be executed in fourteen days. We will keep Irene alive until 1 June 1978. We captured Irene 16 March 1978 walking towards her home, but she never did reach home. I apologize for taking such actions on their lives, but Gail Jackson could have been spared if you didn't think that this was a hoax. Now, Gail Jackson is in the same confinement as Irene, but she knows that she is going to die April 1st, 1978. And after you find her body, and you still think that this is a hoax you will find the body of Irene. Then we will just have to get another black woman.

"Irene put up a good fight before we finally got her. She was with another black woman, but that one got away from us, but we will get her anyway in a few days. I am the Chairman. You really made me upset when you said that this was a hoax. No one says that about the Forces of Evil. We are unstoppable. We strike unexpected. We strike unnoticeable. Except for that one woman that got away, when we kidnapped Irene, she, too, will die if we can't come to an agreement.

"In a few days you should receive a report of another missing black woman which will be Irene. Okay, Chief, Gail Jackson's death is on your head. You will find her body April 1, 1978. April 1st, 1978 she will be dead. June 1 Irene will die. Irene will die sooner if you think it's a hoax with her. I wish that there were some way I could prove it to you that this isn't a hoax. We can't send you her clothes because we burned them up. That's right, both women are in our clutches with no clothes on. They don't need no clothes because my members have to enter-

tain themselves. Chief McClung, if you don't care about anything and if you think that we are lying, then just say so and we will kill them both right now, no questions asked. We don't want to kill them to prove to you that we have. They aren't allowed by the telephone because of the way they act. Right now, Gail Jackson refuses to eat or drink, but Irene is eating pretty good. Maybe she's eating that way because she has only been with us a few days. Got to go now, Chief, maybe some day if you should luck up and catch us, which I doubt, you and I, the Chairman, will meet face to face. We have never been caught. One thing I hate:

1) for to be called a liar;
2) a hoax;
3) someone to think that we are bluffing.

"I suggest to you to either by radio or T.V. or newspaper to find out if anyone is missing by the name of Irene. After you find out that Irene is missing, let's see if you still think that it is a hoax. I'm sorry, Chief, it's got to be this way, because we are here in Columbus, Ga. on business, and we mean business. You had better play ball with us or you will lose a lot of black women in Columbus, Georgia. We already got two of your women. There will be more if you don't take us seriously. I dare you to call this a hoax. Black women, Columbus, Ga. beware

THE FORCES OF EVIL

are upon you. "Chairman"

Please don't risk another life taken after April 1st, 1978, deal with us or you will lose.

I remind you once MORE. ON BACK!!!!!

We are an organization within an organization, that's why we are small in number. Hopefully by October, 1978 we should be at the level we want which should reach twenty-five men. We have to go back to our headquarters for that, and at this time we are leaving Columbus, Ga. until our mission is complete. Don't let this Army writing paper fool you. This kind of paper can easily be gotten. We are patrolling the Wynnton area

just like everyone else. We are picking up black women at random. The way that they are walking around on the street they are not hard to get. I hope you had a wonderful Easter. Me and my members did. We had great entertainment. After you find Gail Jackson's body April 1st, 1978, you better not say hoax again or Irene will die sooner. Right now Irene is scheduled to die 1 June 1978 instead of Gail Jackson, because of what you said about being a hoax. You either play our game or, Chief McClung, you will lose. We will be looking for an acknowledge from you through the newspaper or T.V. or radio. By the way, you can just call off your investigation because they won't find Gail Jackson alive after April 1st, 1978.

Yours Truly,

FORCES OF EVIL (F.O.E.)

ON BACK, pg. VIII

Remember we got Gail Jackson and Irene. Irene should be reported missing in a few days, if she hasn't been reported yet.

Chief McClung: [Ed. note: Within same letter, writer continues]

This is the chairman speaking. For Irene's sake, please correspond with us. You have already threw Gail Jackson's life out the window. She will be executed by my members 1 April 1978. The way she is going to die, well, they want to execute her the way she's supposed to, that's by cremation, but I overruled that. Because I want you to find her body. She is so young. I sure hate to see her when we execute her. She would have lived if you didn't call it a hoax, and if you didn't say we wanted publicity. We don't want nothing but what we ask for.

I'll let you in on something, if you can find the other one [on back] that got away, you might find out the type of vehicles we had. One thing though, we didn't have no license plates. Call this a hoax. You will find both women dead. There's no way you can save Gail Jackson's life. Her sentence is final, she will die April 1st, 1978, you will

LETTER THREE continued

find her body. But you could save Irene. It's up to you. If I were you, I would listen and talk of demands. We are not bluffing, Chief. Her body (Gail Jackson) will be found on Fort Benning, Ga. instead of Wynnton Road. The reason is not too many military policemen patrol the Sand Hill area like you do in the Wynnton area. She will be found April 1st, 1978 on Fort Benning, Georgia 31905.

We are an all-white organization. If any of our members make any mistakes at all, and if they should get caught and arrested, they will be eliminated. Quickly. Please answer, Chief. Irene's life depends on it. Don't her life away (sic) like you did Gail Jackson's life. We hate to prove our point to you by killing our victims. But I see now that's the only way we can get it through to you.

Take Care of Yourself
And Your Family.

Happy EASTER
TO
YOU!!!

Better answer us, Chief, we are not bluffing, as you will find out April 1st, 1978. After you find her, then I'm going to see if you think that we aren't for real.

Good Luck!!!!!

(Tr. 437, 440-45; State's Exh. 3).

LETTER FOUR

24 March 1978. F.O.E.

FORCES OF EVIL

Chairman of the Board

April 1st 1978

The U.S. Army Military Police Desk Sergeant will receive a phone call from one of our members informing them of the location on Sand Hill where the body of Gail Jackson will be found. The M.P. Desk Sgt. will get that phone call at 10:30 a.m., Sat. April 1st, 1978. Upon finding the body you will need a good man or good men to pick up, because she is going to be in bad shape. One of her arms will be broken, and the style of execution will be a sharp blow to her head to cause instant death. Irene will die same way if you still refuse to talk to us after seeing Gail Jackson dead. I don't think you should call it anymore HOAX!!!!!!!!

Good Luck!!

"Forces of Evil"

"Chairman"

"YOU BETTER TALK TO US QUICK!!!!"

If you have any comments to say to us, say it to me personally, not the group as a whole, because it's what I say that really makes the difference. We always put it to a vote whether to kill or let live. You see we cannot be recognized because we do wear masks. By the way, while writing this, I'm looking right at Irene. She sure do look different without any clothes on. We, F.O.E., are here in Columbus, Ga. We will remain here until the stock strangler is caught. It has been decided all black women bodies will be dumped upon Fort Benning, Ga. You better talk to us in a hurry. [On back, please.]

"I think it's best to all the black women in Columbus, Ga. that you talk to us to see what we want in exchange of Irene's life. Details will be given to you after we hear from you either by T.V., radio or

LETTER FOUR continued

newspaper. Better act quick. Gail Jackson's time is leaving her in two weeks. Same Irene.

Signed,

The Chairman of Forces
FORCES OF EVIL

We are a Strict Organization.

(Tr. 446-48; State's Exh. 4).

## LETTER FIVE

THE FORCES OF EVIL (F.O.E.)

24 March 1978

The Chief of Police was notified a few days back that we have Gail Jackson. He was also notified that Gail Jackson would be executed on 1 June 1978. Now, if Chief McClung didn't call it a hoax or in a roundabout way make fun of one of my members handwriting, or if he didn't in a roundabout call us a liar or a bluff, Gail Jackson wouldn't die. Because of the Chief's actions towards me and the rest of the organization, Gail Jackson will die. Instead of finding her body on Wynnton Road, 1 June 1978, she will be found on Fort Benning, Georgia, 1 June 1978, in response to his actions. I sure hope he can sleep, because we have another black woman, her name is Irene. She is scheduled to die 1 June 1978, instead of Gail Jackson. If Chief McClung calls this a bluff he will find Irene earlier than the date planned.

On back!!!!

You people in Columbus, Ga. wake up. The Chief of Police is playing with your lives. If he should call this a hoax like the first one with Gail Jackson, then Irene will die, and we will just get another black woman. It's up to the black citizens of Columbus, Ga. to wake the Police Dept. up and meet our demands. The black women in Columbus, Ga. lives depend on it. Good luck, you people need it.

It's the Chief's fault that Gail Jackson has to die. April 1, 1978 you will find her

!!!! DEAD !!!!

Yours Truly,

"CHAIRMAN"
F.O.E.
FORCES OF EVIL

ON BACK!!

H-10

LETTER FIVE continued

By the way, that's a phony return address

[Ed. note: Doodle lines omitted]

Your Chief of Police

in SO MANY WAYS

have SENTENCED Gail Jackson

To DIE!!!

by his Actions Toward

US F.O.E.

"Chairman"

Please find someway of printing what I have told you! Irene's life depends on it as well as the Police Meeting Our Demands.

(Tr. 450-51; State's Exh. 5)

LETTER SIX

4 April 1978

THE FORCES OF EVIL

In the days that have passed, you have found out that we don't play games. I, the Chairman, am writing this letter myself. I hope you don't make fun of my writing for your sake as well as the black women in Columbus, Ga.

Last night one of my members brought another black woman to me. She is being treated the same as Gail and Irene. She refuses to tell us her name, so we just wait until we hear of her missing. She's being fed and getting proper treatment at this time. This is what I want and also the rest of my members.

1) stocking strangler caught
2) be able to patrol the Wynnton area like everyone else
3) you "police" to hand over the stocking stangler to us after he's caught.

On back!!!

Now, Chief, do you still think that we are phonies? I sure hope not. The one we got now:

1) she's about 22 yrs. old (estimated)
2) light skinned
3) about 5'6" tall
4) weight about 130 lbs.
5) big Afro
6) slender build.

She is next to die. I'm also looking for an apology from you, Chief, for calling us a hoax and talking about our handwriting. I hope I get it. I believe a little torture will get this black woman to tell us her name. I hope so, because if she don't, she will die. They will or you will, find her body on Fort Benning, Georgia. By the way, she is allowed to watch T.V. and listen to the radio. On back!!

Talk to her, please, or she will die. I just hope you don't call this a hoax.

Good Luck
"Chairman"
F.O.E.

H-12

LETTER SIX continued

Please Acknowledge

As Soon As Possible

Thank
You!!!!

P.S. She is a tiger and she has fought us back. Right now, we have cuffs on her, please hurry.* (Tr. 452-53)

---

* In reality, as the record suggests, this next, specifically described victim did not exist.

STATE'S EXHIBIT 1

WHAA
4-6-78
8:55 PM
M.I.D.

MARCH 1 1978

UNITED STATES ARMY

TO: CHIEF OF POLICE OR CSM

DEAR SIR:

WE ARE AN ORGINIZATION COMPOSED OF 7 MEMBERS. I'M WRITING THIS LETTER TO INFORM YOU THAT WE HAVE ONE OF YOUR COLUMBUS WOMEN CAPTIVE. HER NAME IS GAIL JACKSON. SINCE THAT CORONER SAID THAT THE S-STRANGLER IS BLACK, WE DECIDED TO COME HERE AND TRY TO CATCH HIM OR PUT MORE PRESSURE ON YOU. I SEE NOW, MORE PRESSURE IS NEEDED. AT THIS POINT GAIL JACKSON IS STILL LIVING. IF THAT STRANGLER IS NOT CAUGHT BY 1 JUNE 1978. YOU WILL FIND GAIL JACKSON'S BODY ON WYNONTON RD. IF HE'S STILL NOT CAUGHT BY 1 SEPT 1978. THE VITIMS WILL DOUBLE. THIS IS THE BREAK THAT WE HAVE BEEN LOOKING FOR. TELL THAT CORONER, THANKS A LOT. FROM NOW ON BLACK WOMEN IN COLUMBUS, GA WILL BE DISSAPEARING UNTIL THE STRANGLE IS CAUGHT. DON'T FORGET THAT DATE. GAIL JACKSON'S LIFE DEPENDS ON IT. FROM NOW TO 1 JUNE GAIL JACKSON IS WITH US. YOU BETTER ANSWER US

4-15

UNITED STATES ARMY

somehow. TV or Radio. IF WE don't hear some TYPE OF REply IN 2 days WE will TAKE IT AS Though you don't CARE. IF WE TAKE IT THAT WAY. GAIL JACKSON Will BE EXECUTED. you have until Sunday FOR REply. DON'T Think WE ARE bluffing. BETTER YET. I'll give YOU until MidNight MONday until Sunday.

YOUrs Truly

YOU HAVE UNTIL MidNight MONday FOR REply.

P.S.
WE ARE CAll THE:

FORCES OF EVil

WE ARE AN ORGANIZAT WITH AN Orginization.

H-16

F. O. E.
3211 6th Ave
Columbus

31902

Chief of Police

Columbus, GA

31902

H-17

MARCH 7, 1978

"THE CHAIRMAN OF ALL THE FORCES"

"THE FORCES OF EVIL"

F.O.E. = CUSTODY

CONCERN = GAIL JACKSON (IMPRISONMENT 28 FEB 1978)

TO: CHIEF OF POLICE
COLUMBUS POLICE DEPT.
COLUMBUS, GA 31902

DEAR CHIEF:

YOU WERE INFORMED ONCE BEFORE OF THE PERSON CONCERNED. WE ALSO GAVE YOU A DEAD LINE, WHICH WAS 1 JUNE 1978. WE ALSO TOLD YOU TO RESPOND TO US EITHER THROUGH TV OR RADIO. I SEE NOW THAT YOU THINK THAT WE ARE BLUFFING. I CAN'T SEE HOW YOU WOULD THINK SOMETHING LIKE THAT WITH SOMEONE'S LIFE. YOU SEE CHIEF, WE ARE AN ORGANIZATION WITHIN AN ORGANIZATION. THIS IS THE LAST LETTER THAT YOU WILL RECEIVE FROM US. I TOOK THIS MATTER OF YOUR ACTIONS TO THE COMMITTE. I AM OF COURSE THE CHAIRMAN. THE REST OF THE FORCES WANTED GAIL EXECUTED SINCE THEIR WAS NO REPLY FROM YOU. BUT I TWED THAT OUT AND POSPOND HER EXECUTION UNTIL JUNE 1, 1978. BY THAT TIME, IF THE STOCKING STRANGLER IS NOT CAUGHT, GAIL JACKSON WILL BE EXECUTED. EVERY 3 MONTHS AFTER THAT ANOTHER BLACK WOMAN WILL BE TAKEN AND EXECUTED. THEIR'S 2 WAYS THAT YOU COULD PREVENT THIS:

1) CATCH AND CONVICT THE STOCKING STRANGLER
2) GET 10,000 dollars TO US by 1 JUNE 1978

#2

H-19

so you SEE, you can get her back alive. Maybe they haven't reported her missing yet. But they will, you can be sure of that. We got her 28 Feb 1978 at 11:38 p.m. We still have her at this time. It will be best on your part to correspond with us or she will die. She's being feed and taking care of just like if she were at home. She will receive this treatment until June 1, 1978. so her life is in your hands. If you think that we are bull shiting. Keep this letter on file until she will be reported missing. Then if you wait to long, Gail will be executed. You should receive this letter by Friday. so, on TV or radio no later than 11:00 p.m. Friday night, we had better hear something from you, or we won't wait until June 1, 1978 to execute Gail Jackson. because by you not talking to us, that's telling us you don't care. Please for her sake answer us.

Members: 1) The Chairman
2) Secretary (man)
3) Cremator
4) Executor No I.
5) Executor No II.
6) Contractor
7) Seek out man. (peron or man who contacts condemnd people.

Back!!!

(on back please)

ter #2

H-20

DON'T THINK THAT WE ARE BLUFFING.
WE ARE AN ORGANIZATION WITHIN AN ORGANIZATION

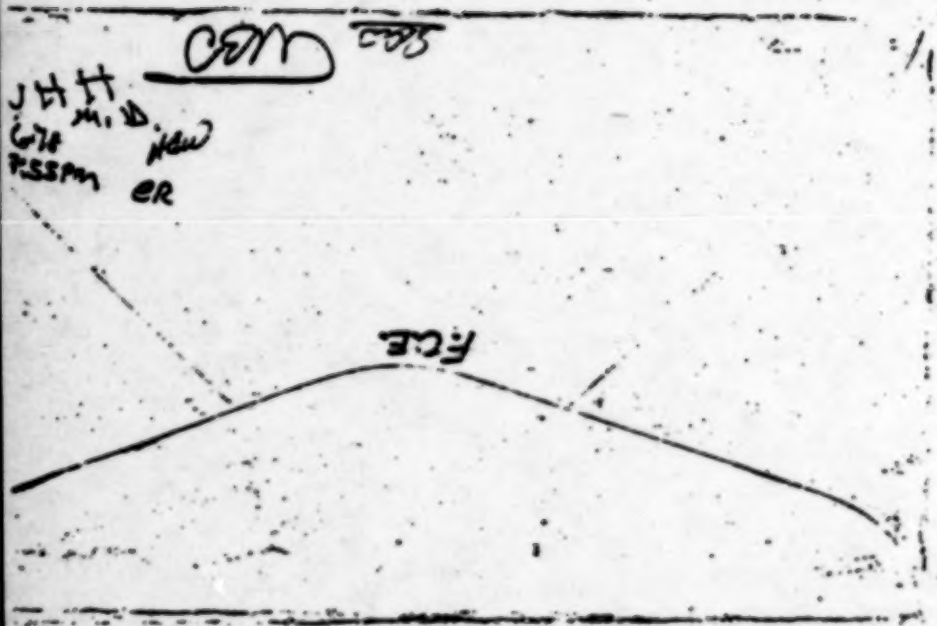
WE ARE AN ORGANIZATION THAT MAKES OUR OWN LAWS AND RULES AND PUNISHMENTS. PLEASE HELP GAIL JACKSON LIVE. SHE'S ONLY 21 YRS OLD. SHE WILL BE 22 IN SEPTEMBER. I'M THE ONE THAT'S KEEPING HER ALIVE, BUT THE REST OF THE FORCES WANTS HER EXECUTED. PLEASE LET US HEAR FROM YOU NO LATER THAN 11:00 p.m. FRIDAY NIGHT. WE WILL NOT WRITE TO YOU ANYMORE. CHIEF, THIS IS NO PRANK OR JOKE, SO DON'T TAKE IT THAT WAY (PLEASE)

CAN'T YOU SEE (I, THE CHAIRMAN WANTS GAIL TO LIVE.
WE WILL CONTINUE ON GETTING BLACK WOMAN HERE IN COLUMBUS UNTIL THE STOCKING STRANGLER IS CAUGHT.

"THE FORCE OF EVIL"
WE ARE HERE IN COLUMBUS, GA
WE CAME FROM CHICAGO ILL.
WE ARE HERE TO MAKE JUSTICE.
P.S.
THANK THAT CORONER FOR SAYING THE STRANGLER IS BLACK. WE ARE ~~PATROLLING~~ PATROLLING ALSO; BUT YOU JUST DON'T KNOW US. WE BETTER HEAR SOMETHING FROM YOU NO LATER THAN 11:00 p.m. FRIDAY NIGHT OR WE WON'T WAIT UNTIL JUNE 1, 1978

I HOPE THAT YOU WILL MAKE THE RIGHT DECISION. SIGNED Good Luck

H-21



OE.
6TH AVE
BUS, GA 31902

C/Olumbus Police DEPT.
C/O-Chief of Police
COLumbus, GA
31902

H-22

Letter #2

STATE'S EXHIBIT NO. THREE



H-23

STATE'S EXHIBIT 3

FORCES OF EVIL

March 25 1978 UNITED STATES ARMY

F. O. E.

This is IN REFERENCE TO THAT COLUMN THAT you WROTE ABOUT US IN THE NEWSPAPER. So you THINK THAT This is A HOAX. BELIEVE ME, This is NO HOAX. TO PROVE IT TO YOU. WE have CAPTURED ANOTHER ONE OF your COLUMBUS, GA BLACK WOMEN. HER NAME IS IRENE. WE don't KNOW her LAST NAME. She REFUSE TO TELL US. NOW, WE HAVE GAIL JACKSON AND IRENE. SINCE you PEOPLE Think This is A HOAX. GAIL JACKSON Will be EXECUTED IN 14 days. WE Will KEEP IRENE ALIVE UNTIL 1 JUNE 1978. WE CAPTURED IRENE 16 MARCH 1978 WALKING Toward her home, but She NEVER did REACH home. I APOLOGIZE FOR TAKING Such ACTIONS ON THEIR LIVES. BUT GAIL JACKSON COULD HAVE BEEN Spared IF you didn't Think THAT This WAS A HOAX. NOW GAIL JACKSON is IN THE SAME CONFINEMENT AS IRENE. BUT She

H-24

UNITED STATES ARMY

KNOWS THAT SHE is going TO die April 1st 1978. AND AFTER you FiNd her body, AND you ST:ll Think THAT This is A HOAX. you will FiND THE body OF IRENE, THEN WE Will JUST HAVE TO GET ANOTHER black WOMAN.

IRENE put up A good Fight BEFORE WE FINALLY GOT HER. SHE WAS WITH ANOTHER BLACK WOMAN, bUT THAT ONE GOT AWAY From US. bUT WE will GET her ANY WAY IN A FEW dAYS. I AM THE Chairman. YOU rEALLY made ME UPSET WHEN YOU Said THAT IT WAS A HOAX. NOONE SAYS THAT ABOUT THE FORCES OF EVIL, WE ARE UNSTOPPABLE. WE STRICK UNEXPECTED. WE STRICK UNNOTICABLE, EXCEPT FOR THAT ONE WOMAN THAT GOT AWAY WHEN WE KIDNAPPED IRENE. SHE TO will DIE IF WE CAN'T COME TO AN AGREEMENT.

H-25

W.H.H.
6-78 HEW
9160m CR

UNITED STATES ARMY D.

III

IN A FEW DAYS, YOU SHOULD RECEIVE A REPORT OF ANOTHER MISSING BLACK WOMAN, WHICH WILL BE IRENE. OK, CHIEF, GAIL JACKSON'S DEATH IS ON YOUR HEAD. YOU WILL FIND HER BODY APRIL 1 1978. APR 1ST '79 SHE WILL BE DEAD, JUNE 1 IRENE WILL DIE. ~~[redacted]~~ IRENE WILL DIE SOONER IF YOU THINK IT'S A HOAX WITH HER. I WISH THAT THEIR WERE SOME WAY THAT I COULD PROVE IT TO YOU THAT THIS ISN'T A HOAX. WE CAN'T SEND YOU HER CLOTHES, BECAUSE WE BURNED THEM HA. THAT'S RIGHT BOTH WOMEN ARE IN OUR CLUTCHES WITH NO CLOTHES ON. THEY DON'T NEED NO CLOTHES, BECAUSE ~~[redacted]~~ MY MEMBERS HAVE TO ENTERTAIN THEMSELVES. CHIEF MCLUNG, IF YOU DON'T CARE ABOUT ANYTHING, AND IF YOU THINK THAT WE ARE LYING, THEN, JUST SAY SO, AND WE WILL KILL THEM

H-26

W.H.H.
9-6-78
GR 9:10 PM (MW)
M.D.

UNITED STATES ARMY

both right NOW, NO questions
ASK. WE DONT WANT TO KILL THEM TO
PROVE TO YOU THAT WE HAVE. THEY
ARE'NT allow by THE TELEPHONE
BECAUSE OF THE WAY THEY ACT.
Right NOW, GAIL JACKSON REFUSES
TO EAT or drink, but IRENE is
EATING PRETTY good. MAYBE SHE'S
EATING THAT WAY BECAUSE SHE
HAS ONLY BEEN WITH US A FEW
DAYS. GOTTO go NOW CHIEF. MAYBE
SOMEDAY IF YOU SHOULD LUCK
UP AND CATCH US, Which I DOUBT,
YOU AND I "THE Chairman" Will MEET
FACE TO FACE. WE HAVE NEVER
BEEN CAUGHT. ONE THING I HATE.
1) FOR TO BE called A LIAR.
2) A HOAX
3) For someONE To Think THAT
WE ARE BLUFFING.

I SUGGUST TO YOU TO EITHER
by RADIO, TV or NENSPAPER TO
FIND OUT IF ANYONE is missing
by THE NAME OF IRENE. AFTER

CEA

H-27

M I B
UNITED STATES ARMY

IRENE is missing LET's SEE IF YOU FIND OUT THAT YOU STILL THINK THAT IT IS A HOAX. I'm sorry CHIEF IT's GOT TO BE THIS WAY, BECAUSE WE ARE HERE IN COLUMBUS, GA ON BUSINESS AND WE MEAN BUSINESS. YOU HAD BETTER PLAY BALL WITH US OR YOU WILL LOOSE ALOT A BLACK WOMEN IN COLUMBUS, GA. WE ALREADY GOT 2 OF YOUR WOMEN. THEIR WILL BE MORE IF YOU DON'T TAKE US SERIOUSLY. I DARE YOU TO CALL THIS A HOAX. BLACK WOMEN IN COLUMBUS, GA. BEWARE

THE FORCES OF EVIL

ARE APON YOU. "Chairman"

PLEASE DON'T RISK ANOTHER LIFE TAKEN AFTER APRIL 1ST 1979. DEAL WITH US OR YOU WILL LOOSE

I REMIND YOU ONCE MORE ON BACK!!!!

H-28

UNITED STATES ARMY

WE ARE AN ORGANIZATION WITHIN AN ORGANIZATION, THAT'S ~~*~~ WHY WE ARE SMALL IN NUMBERS. HOPEFULLY BY OCT. 1978, WE SHOULD BE AT THE LEVEL WE WANT WHICH SHOULD REACH 25 MEN. WE HAVE TO GO BACK TO OUR HEADQUARTERS FOR THAT, AND AT THIS TIME, WE ARE CLEARING COLUMBUS, GA UNTIL OUR MISSION IS COMPLETE. "DON'T GET THIS ~~Army~~ Writing PAPER FOOL YOU". THIS ~~*~~ KIND OF PAPER CAN EASILY BE GOTTEN. WE ARE PROTRALLING THE WYNNONTON AREA JUST LIKE EVERYONE ELSE. WE ARE PICKING UP BLACK WOMEN AT RANDOM. THE WAY THAT THEY ARE WALKING AROUND ON THE STREETS, THEY ARE NOT HARD TO GET. I HOPE YOU HAD A WONDERFUL EASTER, ME AND MY MEMBERS did. WE had GREAT ~~CHRISTA~~ ENTERTAINMENT. AFTER YOU FIND GAIL JACKSON'S body

9-6-78 W.H.H.
9:05PM
ON M.D.

UNITED STATES ARMY

April 1ST 1978. YOU bETTER

NOT SAY HOAX AGAIN, or IRENE
Will die SOONER. RIGHT NOW
IRENE is SCHEDULED TO DIE
1 JUNE 1978 INSTEAD OF C-AIL
JACKSON bECAUSE OF WHAT YOU
SAID ABOUT bEING A HOAX. YOU
EITHER PLAY our GAME or
CHIEF NICKING, YOU Will LOOSE.
WE Will bE LOOKING FOR AN ACKNOWLED
-GE From YOU Through THE NEWSPAPER
or TV or RADIO. by THE WAY, YOU
CAN JUST CALL OFF YOUR INVESTIGATORS
bECAUSE THEY WANT FIND C-AIL
JACKSON ALIVE AFTER April 1ST 1978.

ON BACK Pg VIII

YOURS TRULY
FORCES OF EVIL (F.O.E.)

REMEMbER WE GOT C-AIL JACKSON
AND IRENE. IRENE SHOULD bE
REPORTED MISSING-IN A FEW DAYS
IF SHE HASN'T bEEN REPORTED YET.

H-30

UNITED STATES ARMY

VIII

Chief McClung:

This is The Chairman Speaking, For IRENE's SAKE, ~~PE~~ PLEASE CORRESPOND WITH US. you have ALREADY Through Gaic Jackson LIFE OUT THE WINDOW. She will be EXECUTED by MY MEMBERS 1 April 1978. The way she is going To die, WELL, They WANT TO EXECUTE her The way She suppose TO, That's by CREMATION, but I OVERWED THAT. 'BECAUSE I WANT YOU TO Find her body. She is so young. I sure HATE TO SEE her WHEN WE EXECUTE her. She would have LIVED, if you didn't CALL it A HOAX AND IF you didn't SAY WE WANTED Publicity. WE don't WANT ~~A~~ NOTHING but WHAT WE ASK For.

I'll LET you in ON SOMETHING, IF you could FIND THE OTER ONE

[ON BACK]

H-31

UNITED STATES ARMY

THAT GOT AWAY, YOU might
FIND OUT THE TYPE OF VEHICLES
E had. ONE THING THOUGH, WE
dNT HAVE NO LICENSE PLATES. CALL
his A HOAX. YOU will FIND BOTH
IOMEN d'EAD. THEIrs NO WAY YOU
AN SAVE GAIL JACKSON'S LIFE. HER
SENTENCE IS FINAL, SHE will die
RIL 1ST 1978, YOU will Find HER body.
UT YOU COULD SAVE IRENE. IT'S
TO YOU. IF I WERE YOU, I WOULD LISTEN
D TALK OF DEMANDS. WE ARE NOT BLUFFING
IEF. IF HER body (GAIL JACKSON) Will
E FOUND ON FT. BENNING, GA. INSTEAD OF
INNONTON RD. THE REASON IS, NOT TO MANY
ILITARY POLICEMEN PATROL THE SAND
ILL AREA LIKE YOUR do IN THE
YNNONTON AREA. SHE will be FOUND
RIL 1ST 1978 ON FT. BENNING, GA 31905.

WE ARE AN All White ORGANIZATION.
IF ANY OF Our MEMBERS MAKE
ANY MISTAKES AT All AND IF THEY
SHOULD GET CAUGHT AND ARRESTED.
THEY will be ELIMINATED. QUICKLY.
PLEASE ANSWER CLIFF. IRENE'S

UNITED STATES

W.H.H.

LIFE DEPENDS ON IT. DON'T HER LIFE AWAY, LIKE you did GAIL JACKSON'S LIFE. WE HATE TO PROVE OUR POINTS TO YOU BY KILLINGS OUR VICTIMS. BUT I SEE NOW THAT'S THE ONLY WAY THAT WE CAN GET IT THROUGH TO YOU.

TAKE CARE OF YOURSELF AND your FAMILY.

HAPPY EASTER

TO

YOU!!!

BETTER ANSWER AS CHIEF,

WE ARE NOT BLUFFING.

AS YOU WILL FIND OUT April 1ST 1978. AFTER YOU FIND HER, THEN I'm GOING TO SEE IF YOU THINK THAT WE AREN'T FOR REAL. Good Luck!!!!

H-33

H-34

STATE
E
3

THE COLUMBUS POLICE DEPT.
C/O: CHIEF OF POLICE
MCCLUNG
COLUMBUS, GA
31902

H-35

H-36

STATE'S EXHIBIT NO. FOUR



H-37

24 MARCH 1978 F.O.E

"FORCES OF EVIL"

CSM

UNITED STATES ARMY

Chairman of The board

APRIL 1ST 1978

9-6-78 @ 8:55am MID. Hew

I

THE U.S. ARMY MILITARY POLICE DESK SGT. WILL RECEIVE A PHONE CALL FROM ONE OF OUR MEMBERS INFORMING THEM OF THE LOCATION ON SAND HILL WHERE THE body OF GAIL JACKSON WILL BE FOUND. THE M.P. DESK SGT. WILL GET THAT PHONE CALL AT 10:30 A.M. SAT. April 1ST 1978. UPON FINDING Body, you WILL NEED A good MAN or good MEN TO pick up, BECAUSE She's going TO BE IN BAD SHAPE. ONE OF Arms WILL BE broKEN AND THE STYLE OF EXECUTION WILL BE A SHARP blOW TO HER HEAD TO CAUSE INSTANT DEATH. IRENE WILL DIE SAME WAY IF YOU STILL REFUSE TO Talk TO US. AFTER SEEING GAIL JACKSON DEAD. I DON'T THINK YOU SHOULD Call IT ANY MORE

good

Luck..

HOAX!!!!!!!!!!

H-38

Letter #3

COM "FORCES OF EVIL"

II "CHAIRMAN"

W. H. 9-6-78 9:30 AM

UNITED STATES ARMY

"YOU BETTER TALK TO US QUICK!!!!

IF YOU HAVE ANY COMMENTS TO SAY TO US. SAY IT TO ME PERSONALLY NOT THE GROUP AS A WHOLE. BECAUSE IT'S WHAT I SAY THAT REALLY MAKES THE DIFFERENCE.

WE ALWAYS PUT IT TO A VOTE, WHETHER TO KILL OR LET LIVE. YOU SEE, WE CANNOT BE RECONIZED BECAUSE WE DO WEAR MASK. BY THE WAY, WHILE WRITING THIS, I'M LOOKING RIGHT AT IRENE. SHE SURE DO LOOK DIFFERENT WITHOUT ANY CLOTHES ON.

(WE F.O.E. ARE HERE IN COLUMBUS, G-A. WE WILL REMAIN HERE UNTIL THE STOCTING STRANGLER IS CAUGHT. IT HAS BEEN DECIDED, ALL BLACK WOMEN BODIES WILL BE DUMPED UPON FT. BENNING, G-A.

Letter" YOU BETTER TALK ~~TO US~~ TO US IN A HURRY.

[TON BACK PLEASE]

H-39

I THINK ITS BEST TO ALL THE
BLACK WOMEN IN COLUMBUS, GA
THAT YOU TALK TO US TO SEE
WHAT WE WANT IN EXCHANGE
OF IRENE'S LIFE. DETAILS WILL
BE GIVEN TO YOU AFTER WE HEAR
FROM YOU EITHER BY TV, RADIO OR
NEWSPAPER. BETTER ACT QUICK.
GAIL JACKSON'S TIME IS LEAVING
HER IN 2 WKS. SAME IRENE.

SIGNED

CHAIRMAN OF FORCES

FORCES OF EVIL

WE ARE A STRICT ORGANIZATION

H-40

THE F.O.E.
3231 6TH AVE
COLUMBUS, GA 31902

THE COLUMBUS POLICE DEPT.
C/O CHIEF OF POLICE
" McCLUNG
COLUMBUS, GA
31902

H-41

STATE'S EXHIBIT NO. FIVE



H-42

STATE'S EXHIBIT 5

THE FORCES OF EVIL (F.O.E.)

24 March 1978 UNITED STATES ARMY

CBM

I THE CHIEF OF POLICE WAS NOTIFIED A FEW DAYS BACK THAT WE HAVE GAIL JACKSON. HE WAS ALSO NOTIFIED THAT GAIL JACKSON WILL BE EXECUTED 1 JUNE 1978. NOW IF CHIEF MCCLUNG DIDN'T CALL IT A HOAX, OR IN A ROUND ABOUT WAY MADE FUN OF ONE OF MY MEMBERS HANDWRITING OR IF HE DIDN'T IN A ROUND ABOUT CALLED US A LIAR OR A BLUFF. GAIL JACKSON WOULDN'T DIE. BECAUSE OF THE CHIEF'S ACTIONS TOWARD ME AND THE REST OF THE ORGANIZATION, GAIL JACKSON WILL DIE. INSTEAD OF FINDING HER BODY ON WYNNONTON RD 1 JUNE 1978, SHE WILL BE FOUND ON FT. BENNING, GA 1 APRIL 1978 IN RESPONSE TO HIS ACTIONS. I SURE HOPE HE CAN SLEEP. BECAUSE WE HAVE ANOTHER BLACK WOMAN. HER NAME IS IRENE. SHE IS SCHEDULED TO DIE 1 JUNE 1978 INSTEAD OF GAIL JACKSON. IF CHIEF MCCLUNG CALL THIS A BLUFF. HE WILL FIND IRENE DEAD EARLIER THAN THE DATE [redacted] PLAN.

ON BACK!!!

H-43

CRM

W.H.H. 4-6-78 4:05 P.M.

UNITED STATES ARMY
M.I.D.

II

YOU PEOPLE IN COLUMBUS, GA, WAKE UP, THE CHIEF OF POLICE is playing With your LIVES. IF he should call This a HOAX LIKE THE FIRST ONE WITH GAIL JACKSON, THEN IRENE Will die, AND WE Will JUST GET ANOTHER black WOMAN. IT'S up TO THE BLACK CITIZENS OF COLUMBUS, GA TO WAKE THE POLICE DEPT up AND MEET our DEMANDS. THE BLACK WOMEN IN COLUMBUS, GA LIVES DEPEND ON IT. GOOD LUCK, YOU PEOPLE NEED IT.

IT'S THE CHIEF
FAULT THAT
GAIL JACKSON
HAS TO DIE.
APRIL 1 A 78
YOU Will
FIND HER

Yours Truly
"CHAIRMAN"
F.O.E.

!!! DEAD !!! FORCES OF EVIL

ON BACK!!

H-44

By THE WAY, THAT'S a PHONY
RETURN ADDRESS

YOUR CHIEF OF POLICE
IN SO MANY WAYS HAVE
SENTENCED GAIL ~~JACKSON~~
TO DIE!!!

PLEASE
FIND SOMEWAY
OF PRINTING — by
WHAT I HAVE
TOLD YOU!
IRENE'S LIFE
DEPENDS ON HIS
ACTIONS
IT AS WELL ~~TOWARD~~
AS THE
POLICE MEETING US.
OUR DEMANDS

F.O.E.
"CHAIRMAN"

H-45

THE F.O.E "Chairman"
3321 6TH AVE
COLUMBUS GA 31902
1978

4-6-78
9:05 PM
W.H.H

THE COLUMBUS LEDGER

COLUMBUS, GA
31902

CBM

Letter #5

STATE'S EXHIBIT NO. SIX



H-47

4 APRIL 1978

UNITED STATES ARMY

# THE FORCES OF EVIL

IN THE DAYS THAT HAVE PAST. YOU HAVE FOUND OUT THAT WE DON'T PLAY GAMES. I THE "CHAIRMAN" AM WRITING THIS LETTER MYSELF. I HOPE YOU DON'T MAKE FUN OF MY WRITING, FOR YOUR SAKE AS WELL AS THE BLACK WOMEN IN COLUMBUS, GA.

LAST NIGHT, ONE OF MY MEMBERS BROUGHT ANOTHER BLACK WOMAN TO ME. SHE IS BEING TREATED THE SAME AS GAIL AND IRENE. SHE REFUSES TO TELL US HER NAME. SO WE JUST WAIT UNTIL WE HEAR OF HER MISSING. SHE'S BEING FED AND GETTING PROPER TREATMENT AT THIS TIME. THIS IS WHAT I WANT AND ALSO THE REST OF MY MEMBERS

1) STOCKING STRANGLER CAUGHT
2) BE ABLE TO PROTRAL THE WYNNTON AREA LIKE EVERYONE ELSE
3) YOU "POLICE" TO HAND OVER THE STOCKING STRANGLER TO US AFTER HE'S CAUGHT.

STATE'S EXHIBIT 6

[redacted] ON BACK !!!

H-48

UNITED STATES ARMY

NOW CHIEF, do you STILL THINK THAT WE ARE PHONIES? I SURE HOPE NOT. AND THE ONE WE GOT NOW:

1) SHE'S ABOUT 22yrs OLD (ESTIMATED)
2) LIGHT SKINNED
3) ABOUT 5'6" TALL
4) WEIGHT: ABOUT 130 lbs
5) BIG AFRO
6) SLENDER build

SHE IS NEXT TO DIE.
I'M ALSO LOOKING FOR AN apology FROM YOU CHIEF FOR CALLING US A HOAX AND TALKING ABOUT OUR HANDWRITING. I HOPE I GET IT. I BELIEVE A LITTLE TORTURE WILL GET THIS BLACK WOMAN TO TELL US HER NAME. I HOPE SO, BECAUSE IF SHE DON'T, SHE WILL DIE, THEY WILL OR YOU WILL FIND HER BODY ON FT. BENNING GA. BY THE WAY. SHE IS ~~PREGNANT~~ ALLOW TO WATCH TV AND LISTEN TO THE radio.

ON BACK!!

LETTER #6

H-49

UNITED STATES ARMY

W.W.H.

4-6-71
MID. 9:05 PM

TALK TO HER PLEASE or SHE WILL DIE. I JUST HOPE YOU DINIT CALL THIS A HOAX.

GOOD LUCK

"CHAIRMAN"

F.O.E.

PLEASE ACKNOWLEDGE AS SOON AS POSSIBLE

THANK YOU!!!!

P.S.

SHE is A TIGER. AND SHE HAS FOUGHT US BACK. RIGHTNOW, WE HAVE CUFFS ON HER. PLEASE HURRY.

Letter #6

H-50

Columbus Police Dept.
c/o Chief McClung
Columbus, Ga
31902

H-51

LETTER #6

## Petitioner's Confessions in Relevant Part

Regarding Gail Jackson:

> . . . Along the road, she started taking her clothes off. I got mad and I told her she was a crazy ass.
>
> She said, me, what's wrong with me? I told her she was silly. I grabbed her, she tried to get away and I hit her with a karate chop across the head. (Tr. 772).

Regarding Irene Thirkield:

> I took her to the Sand Hill Bar and she propositioned me. I guess because I don't like prostitutes I asked her again what she said. She asked me how much I was willing to pay. That made me mad, so I told her I would give her nothing she wanted. She got into the car and we were talking. It completely slipped my mind why she was with me because the word proposition or prostitute didn't even come up. A little while later she asked me how much I was going to pay. I had to find an easy located place to get rid of her, so I saw Maertens Range. I drove down a dirt road on Maertens Range and parked. I looked at her and she was taking off her clothes. She looked at me and saw how mad I was. She saw my eyes were big and I was mad. She asked me what was wrong with me. I told her she was like the rest of the prostitutes, all she wanted was to take others people's money. She got scared. I did the same way I did Gail. I gave her a karate chop across the head. She was out cold. (Tr. 773-74).*

Again regarding Gail Jackson:

> About 1800 [hours, i.e., 6:00 P.M.] a black female came into the club. . . . [S]he [Gail Jackson] propositioned me for twenty dollars. That really pissed me off. I got blown up and steamed. I could tell I had gotten white. She fucked up my head. . . .

---

* Petitioner was not accused of any sexual abuse in the killings.

We got on the road heading back toward Fort Benning. . . . [S]he started taking her clothes off in the car. It was like pouring gasoline on a fire. I started burning up. Instead I said, goddam stupid ass. She said, what's wrong with you?

I started swelling up. At this time I hit her with my left hand. (Tr. 798, emphasis supplied).

C O N F I D E N T I A L

5701 Sherborne Drive
Columbus, Georgia
November 19, 1978

Mr. Richard O. Smith
Attorney at Law
P. O. Box 39
Columbus, Georgia 31902

RE: Hance, William Henry

Dear Mr. Smith:

At your request I have been conducting a psychological evaluation of the above-named individual. To date, I have interviewed him with you for an hour (August 25), I interviewed him myself for about an hour and a half (August 31) and most recently I administered the Rorschach Inkblot Test to him (November 2, 1978).

While I have not completed all the testing I have planned, I am writing you this tentative report because my impression to date is that Mr. Hance may not be capable of assisting in an appropriate, rational way in his own defense.

Mr. Hance is not psychotic in the usual sense. Usually to call a person psychotic requires signs of a loss of contact with reality: hallucinations, delusions, bizarre ideation, breaks in his associative thinking process. Mr. Hance does not display any of these symptoms: he appears to be in good touch with reality and he appears calm and in control of himself.

While not outright bizarre, his thinking and emotional reactions are nevertheless clearly not normal, either. He suffers from what is psychiatrically called a Personality Disorder. Such disorders are usually conceptualized as failures of development, so that, although the individual is physically grown, he is operating at an immature psychological level.

Although it is not necessarily the case that persons with such disorders cannot help in their legal defense, in this case, it is my judgment that the problem is so severe that it does prevent him from the appropriate behavior.

Mr. Hance seems to be to me extremely narcissistic and egocentric. Everything is seen only as it affects him; he seems incapable of any sort of empathy. In addition, he is prone to daydreaming and fantasies.

While (unlike the psychotic) he recognizes these fanatsies as such, when they are directed towards the future, he seems incapable of estimating their probability of actually occurring. Thus, he seems to pin his hopes on his fantasies rather than realistically sizing up a situation.

These tendencies manifest themselves most obviously in his expectations of his trial. He seems to view it more as an occasion for dramatic revelations than as a sober defense of his very life. I believe he wants to live, but he really doesn't seem to grasp the seriousness of his situation.

His egocentrism and his fantasies prevent him from seeing his situation either from your point of view or from the point of view of prospective jurors. Without this elementary ability, how can he assist in his own defense?

The characteristics of his behavior which I have been emphasizing are, of course, like those of a child and thus he is about as capable as a child would be of cooperating in a rational defense.

I should also add that he himself strongly denies that he has any mental problem (as is typical of Personality Disorders) and it is very unlikely that he is malingering a Personality Disorder.

If you have any questions about this report, please call me.

Very truly yours,

Lewis R Lieberman

Lewis R. Lieberman, Ph. D.
Clinical Psychologist
Ga. Lic. #205

J-2

CARL E. BEGLEY, PH.D. CLINICAL PSYCHOLOGY
6280 BEACH BOULEVARD • JACKSONVILLE, FLORIDA 32216
PHONE (904) 724-8228

November 21, 1973

Lew Lieberman, Ph.D.
Dept. of Psychology
Columbus College
Columbus, Georgia 31907

Dear Lew:

I looked at the Rorschach records you sent me. Some of my strongest impressions are consistent with the very limited but highly significant information which you give. The fact that he rejected card II, according to Phillips and Smith, indicates extreme hostility. Such Rorschach content as a fish and a bird and a crayfish and a cow's head indicate either passivity or the acting out of a personality disorder. Recreational themes, such as, an acrobat and a man on a motorcycle, fit in with the personality disorder. Since we already know that he acts out in socially unacceptable ways, to put it mildly, such findings from the Rorschach don't really add too much to what is known. I would think a major question would be whether he is a personality disorder or whether he might also be psychotic. The low F+ percent may raise a question of whether he has contact with reality or not. My impression is that he is not psychotic. This is in spite of the low F+ percent and low number of populars. It is even in spite of the fact that his F+ percent is probably below 50 and his populars are probably below 4. I think, for example, the fish given on card IV should have been scored minus and the cats on VIII are not popular. Anyway, I am saying he is probably not psychotic because I do not see anything really bizarre, and personality disorders frequently produce low F+ percents.

There are a few interesting aspects to the content which I might speculate on. There seems to be a strange combination of ambition and immaturity. This is suggested by animals trying to get to the top, acrobats, and by the [illegible] approach. The immaturity is indicated by the recreational themes and by the passivity already mentioned above.

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The recreational themes have an additional element of thrill seeking, for example, the man on the motorcycle and the acrobat. He could probably be accurately described as narcissistic and a thrill seeker.

Of course, it would be important to not come to a conclusion on the test results alone. For example, if we were describing symptoms which are suggestive of schizophrenia, we certainly couldn't rule that out with this borderline record.

My general impression is of a personality disorder. He doesn't seem much comfort with himself. His use of white space and his use of color with battery as the content simply adds to the passive-aggressive picture.

Hope this will be helpful. Let me know whether these impressions hit the mark.

Best wishes,

Carl

CJE/lm

Best Copy Available

# CENTRAL STATE HOSPITAL

## Milledgeville, Georgia 31062

May 23, 1978

The Honorable John H. Land
Judge, Superior Courts
Chattahoochee Judicial Circuit
P. O. Box 1340
Columbus, Georgia 31902

Re: Hance, William Henry
Case No: 221,661
Muscogee County
Binion 2 South

Dear Judge Land:

The above named patient was admitted to the Forensic Services Division on April 21, 1978 by Order of Your Court. This 26-year-old black male is charged with the offenses of Murder, Criminal Attempt, and Theft by Extortion. Your Order directs that we examine Mr. Hance and render to the Court opinions concerning his competency to stand trial and degree of responsibility for his actions at the time of the alleged offense.

On admission, Mr. Hance was in no acute physical distress. A complete physical examination administered to the patient was within normal limits and routine lab tests were negative, thus showing him to be in good physical condition. His chest X-ray was negative. A skull series showed his skull to be essentially negative. His neurological examination was within normal limits as was his electroencephalogram. A psychological evaluation administered on May 2, 1978, showed the patient to be functioning in the Dull Normal Range of Intelligence. There was no indication of a gross neurological disorder. Personality testing shows that Mr. Hance is anxious, depressed, apathetic, and experiences feelings of worthlessness.

During our interviews with Mr. Hance, he has been well oriented. He said that he has had no previous mental health contact. He is currently experiencing moderate depression and anxiety which are associated with emotional difficulties characterized by long-standing feelings of inadequacy, inferiority, and insecurity. There are, however, no convincing indicators to suggest that this individual is psychotic at the present time or has ever been out of contact with reality in the

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past. Mr. Hance is aware of the charges against him, he has an understanding of basic courtroom procedure, and it is our opinion that he can communicate adequately with an attorney in the preparation of his defense. Therefore, we consider him to be competent for trial at the present time. In terms of his degree of responsibility for his actions at the time of the alleged offenses, we find no psychiatric or psychological indications that Mr. Hance would not have been able to distinguish between right and wrong at that time.

We have completed our examination of Mr. William Henry Hance, and he is now ready to be returned to the custody of the Court for disposition of the charges against him. Please send a duly authorized person for Mr. Hance at your earliest convenience.

Please let us know if we can provide you with any additional information about this case.

Very respectfully yours,

Robert W. Wildman, II, Ph. D.
Clinical Psychologist II
Forensic Services Division

Carl L. Smith, M. D.
Physician II
Forensic Services Division

RWW:CLS:jr

cc: Honorable William J. Smith (Enclosed)
Defense Counsel (Enclosed)

# CENTRAL STATE HOSPITAL
## Milledgeville, Georgia 31062

August 30, 1978

Honorable John H. Land
Judge, Superior Court
Chattahoochee Judicial Circuit
RFD, Whitesville Road
Columbus, Georgia 31902

Re: Hance, William Henry
Case No: 221 661
Muscogee County

Dear Judge Land:

I am writing this letter at the request of Mr. Richard O. Smith, who is representing the above-named individual. Mr. Smith asked me in his letter of August 28, 1978 to supply him with "a list of all tests and results from said tests and particularly the WAIS and the MMTI test administered to Mr. Hance." I am assuming that the "MMTI" referred to by Mr. Smith was meant to read MMPI, which was the test given to his client.

Mr. Hance was given the Wechsler Adult Intelligence Scale, the Bender Gestalt Test, the Memory for Designs Test, and the Minnesota Multiphasic Personality Inventory.

Mr. Hance achieved a Verbal IQ of 84, a Performance IQ of 85, and a Full Scale IQ of 84 which places him in the average range in terms of his intellectual abilities and indicates that in this regard he exceeds 15 per cent of the normative group which is roughly representative of the population of the United States. His poorest performance was on a subtest measuring common sense and the ability to evaluate past experiences. His best performance was on a subtest measuring attentio and rote memory. There is no evidence of organic involvement.

Mr. Hance's MMPI profile suggests that he is experiencing moderate depression and anxiety. Profiles similar to Mr. Hance's are typically seen with individuals who are intensely anxious and pleading for help. Typically, they tend to complain of worrying and nervousness. They have personality difficulties marked by long-standing feelings of inadequacy, inferiority, and insecurity. They tend not to be particularly able to think for themselves and their emotional difficulties frequently interfere with their judgement such that they often appear to lack common sense in everyday matters. They do not intergrate what they learn or profit from their own experiences. They tend to be passively dependent. Socially they lack poise and assurance and do not find socialization experiences rewarding partly because of an inability to take a dominant or ascendant role in interactions with others. They do not readily form stable, mature or warm interpersonal relation ships. They tend to deal with their problems on an internalization basis and lack defenses in dealing with their anxiety. They typically have rich fantasy lives, especially about sexual matters, and spend much time daydreaming. Patients with

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similar profiles typically complain of concentration and thinking difficulties, experience indecision and doubt, and are described as worriers who lack self-esteem and are prone to engage in suicidal ruminations.

I hope that this information is responsive to Mr. Smith's letter and helpful to the court. Please let me know if I can provide any additional information about this case.

Very respectfully yours,

Robert W. Wildman, II, Ph.D.
Clinical Psychologist II
Forensic Services Division

RWW:jab

cc: Honorable William Smith

Mr. Richard O. Smith

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## COURT'S PATENTLY ERRONEOUS CHARGE ON INTENT

I'm going to give you certain presumptions of law which are applicable in this case. A presumption is a conclusion that the law draws from given facts. Now, each of these presumptions is rebuttable, that is, they are subject to being overcome by evidence to the contrary. Now, these are as follows: Every person is presumed to be of sound mind and discretion. This presumption may be rebutted. The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. But these presumptions may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts, and that's you, the jury, may find such intention upon consideration of the words, the conduct, the demeanor, motive and all other circumstances connnected with the act for which the accused is prosecuted.

A specific intent to commit the crimes charged in this indictment, each count thereof, is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury and it's ordinarily ascertained by conduct. Intent may be shown in many ways provided you find that it existed from the evidence produced before you. It may be inferred from the proven circumstances or by acts and conduct, or it may be presumed when it is the natural and necessary consequence of the act. (Tr. 1093-94; emphasis supplied).

K-1

No. 82-6352

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HENRY HANCE,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Butts County, Georgia

# BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for
Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3339

## QUESTIONS PRESENTED

1.

Whether the state habeas corpus court properly used an adequate and independent state ground in considering the admissibility of Petitioner's confession?

2.

Whether the state courts properly determined that there was probable cause for an arrest of the Petitioner and that Petitioner's confession was admissible?

3.

Whether the trial court properly allowed admission of Petitioner's confession after a determination that Petitioner did not request an attorney and that the authorties did not prevent Petitioner from seeing an attorney?

4.

Whether the trial court was required to conduct a sua sponte competency hearing and whether the court properly allowd Petitioner to act as lead counsel?

5.

Whether the Petitioner received effective assistance of counsel at trial?

6.

Whether the trial court excluded any relevant mitigating evidence during the sentencing phase of Petitioner's trial?

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No. 81-6352

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HENRY HANCE,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Butts County, Georgia

# BRIEF IN OPPOSITION FOR THE RESPONDENT

## PART ONE

## STATEMENT OF THE CASE

Petitioner, William Henry Hance, was indicted in the Superior Court of Muscogee County in August, 1978, for the murder of Brenda Gail Faison, a/k/a Gail Jackson, and for criminal attempt, theft by extortion. (R. 18-19).1/ Petitioner was granted the right to represent himself at trial and was assisted by co-counsel, Richard Smith and Walter Johnson. (R. 15-16, 20; T. 421, 425). Following a trial by jury, Petitioner was found guilty on both charges and received the death penalty for murder under Ga. Code Ann. § 27-2534.1(b)(7) and a five year sentence for criminal attempt, theft by extortion. (R. 22-24).

An appeal was filed on behalf of the Petitioner to the Supreme Court of Georgia. Richard O. Smith and William Alexander Byars filed the brief and made argument on behalf of the Petitioner.

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1/ R. refers to the record on appeal to the Supreme Court of Georgia. T. refers to the trial transcript from the Superior Court of Muscogee County. H.T. refers to the transcript of the habeas corpus hearing held in the Superior Court of Butts County.

Petitioner also filed a list of errors in his own behalf to be considered by the Supreme Court of Georgia on direct appeal, which were addressed in the court's decision. Both convictions and sentences were affirmed by the court and rehearing was denied on July 15, 1980. Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980).

A petition for a writ of certiorari was filed on behalf of the Petitioner in this Court challenging the decision of the Supreme Court of Georgia. The petition was denied on December 15, 1980. Petitioner filed a pro se motion for reconsideration in this Court which was denied on January 26, 1981. Hance v. Georgia, 449 U.S. 1067 (1980), reh'g den. 449 U.S. 1135 (1981).

A petition for a writ of habeas corpus was filed with the Superior Court of Butts County by Mr. Stephen A. Kermish on behalf of the Petitioner. A hearing was held on the petition on April 8, 1981. A brief was filed by Mr. Kermish and a brief was also filed by the Petitioner in his own behalf with that court. After a consideration of the record and evidence, the state habeas corpus court denied relief on July 27, 1981. Petitioner filed an application for a certificate of probable cause to appeal to the Supreme Court of Georgia. Petitioner filed a pro se brief in his own behalf in that court. On October 9, 1981, the Supreme Court of Georgia denied the application.

Petitioner has subsequently filed the instant petition for a writ of certiorari to the Superior Court of Butts County, Georgia, challenging the findings of that court.

Although a detailed statement of facts is set forth in the decision of the Supreme Court of Georgia, Respondent will set forth pertinent facts at this time.

During the year of 1978, the City of Columbus, Georgia, was being terrorized by the so-called "Columbus strangler" or "stocking strangler" killings. These involved the murders of a number of elderly white females who lived in the same general area. These women had all been beaten, raped and strangled by the use of a stocking or a similar item.

Between March 3rd and April 5th, 1978, Columbus Chief of Police Curtis McClung received six letters in the regular mail, allegedly from an organization known as the Forces of Evil. (T. 426-452). The letters were all written on United States Army stationery and claimed that the Forces of Evil was a white organization that had kidnapped two black women, Gail Jackson and a woman named Irene. In the first letter the writer claimed to have captured a woman by the name of Gail Jackson. The letter stated that the purpose of the group was to catch the Columbus strangler or put more pressure on the police to do so. The threat was made that if the strangler was not caught by June 1, 1978, Gail Jackson would be killed and other black female victims would follow until the strangler was caught.2/

The next letter received indicated that the Chief of Police could either catch the Columbus strangler or give $10,000 to the Forces of Evil in order to prevent the execution of Gail Jackson. This threat was the basis for the charge of criminal attempt to commit theft by extortion. Subsequent letters mentioned that a black female named Irene had been captured and was being held. The letters continued to indicate that unless the demands were met the victims would be killed. (T. 437, 440-445).

The fourth letter to the Chief of Police stated that the

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2/ It is significant to note that by the time the first letter was received, the victim, Gail Jackson had already been killed.

military police desk sergeant would get a telephone call on April 1, 1978, giving the exact location of the body of Gail Jackson. (T. 447). The writer stated that the victim's arm would be broken and that "the style of execution will be a sharp blow to her head to cause instant death." (T. 447). The fifth letter was sent to a local newspaper and again threatened the life of both victims. The final letter was received the day after the Petitioner had been arrested and indicated that a third female had been captured by the group. (T. 451-453).

On March 30, 1978, Specialist George Thompson and Sergeant James Harris at Fort Benning each received a telephone call from an unidentified black male giving the location of Gail Jackson's body. (T. 459-463, 466-468). A Columbus Police Department receptionist also received a call on March 30, 1978, from a person that sounded like a black male stating that Jackson's body was by a tree near the Sand Hill Bar. (T. 471-475). The message also indicated that the body would be found approximately 100 meters past the bar and past a speed limit sign. During the conversation with the Columbus Police Department, the caller indicated that he was the Forces of Evil.

A group of law enforcement officers subsequently went to the area described in the telephone calls. The body of a black female, later identified as Gail Jackson, was found in that area. The body was covered with twigs and leaves. As noted by the Supreme Court of Georgia:

> "The beating [of the victim] was so severe that the victim's entire face was destroyed and bone fragments were scattered about the area. Some of the victim's brain tissue was literally beaten from the skull. The force

of the Appellant's attack was so great it produced a depression in the ground behind the victim's head. The Appellant then buried the victim's body in a shallow grave he dug with an entrenching tool."

Hance, supra, 245 Ga. at 856.

An autopsy was performed on the partially decomposed body. Doctor Joe Webber indicated that the entire jaw and facial structure were missing and that one could look directly into the cranial cavity where there remained only a small amount of liquified brain tissue. The doctor also found that the left elbow had been dislocated. (T. 502-503).

On April 3, 1978, a telephone call was received by a desk sergeant at Fort Benning from a man informing him that the body of a woman named Irene could be found in an area of Fort Benning called Maerten's Range. (T. 626-627). The caller, who sounded like a black male, stated that he was a member of the Forces of Evil. (T. 626-627). Following the directions from this telephone call, the body of Irene Thirkield was discovered. Once again, the skull had been broken into many pieces and several pieces were missing. (T. 647, 649). Irene Thirkield had last been seen on March 15, 1978, talking to a soldier in Vice Mitchell's Tavern. (T. 606-611, 614, 617-619). One of the witnesses identified the Petitioner as the soldier seen with the victim and stated that the two left the Tavern together. Another witness saw the victim leave with a soldier in a blue car accompanied by a man named Johnny King. King testified that he got a ride from the Tavern on that date with the victim and a soldier who let them out two or three blocks from the Sand Hill Bar. (T. 610-611, 618-622).

Mr. Marvin Besson participated in investigating the murder of Irene Thirkield and another woman who had been murdered on the military base at Fort Benning. Mr. Besson obtained the tape recordings made of the telephone calls to the military police desk at Fort Benning. Those tape recordings were the ones that indicated where the bodies could be found. The tape recordings were taken to the company commander and first sergeant of the Petitioner. Both of these individuals indicated that they thought it was the Petitioner's voice on those tapes. (H.T. 19). Richard Fox indicated that his investigation revealed that the Petitioner was the last one seen with victim Irene Thirkield. (H.T. 33). Petitioner had also been in talking to Mr. Fox on prior occasions concerning the death of a woman on the military base. (H.T. 32).3/

From the above it can be seen that the military authorities knew that the person who killed the victims was a young black male. They also had reason to believe he was a soldier on the base because, "the calls they received showed an intimate knowledge of the military reservation and the letters were written on military stationery. Also, a military cap was found near one of the bodies." Hance, supra, 245 Ga. at 864. Furthermore, they knew that the Petitioner was the last person seen with one of the victims prior to her death. In addition to all of this evidence which was presented at Petitioner's trial, the authorities also knew that Petitioner's commander and sergeant had indicated that the voice on the tapes describing the locations of the bodies was probably that of the Petitioner. Based upon all of this information, Agent Fox and Agent Besson went to the Petitioner's unit and indicated they would like to talk with the Petitioner.

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3/ This victim was Karen Hickman, one of the two victims for whose murders the Petitioner was tried by the military authorities.

After being requested, the Petitioner agreed to be interviewed and was moved to C.I.D Headquarters. He was advised of the nature of the case and the fact that he had been the last person seen with one of the victims. He was advised of his rights by Agent Fox, who determined that Petitioner understood his rights and was willing to waive these rights and be interviewed without an attorney. (T. 754-755). The interview began sometime after noon on April 4, 1978. It continued during the day with breaks being taken to allow the Petitioner to eat and use the restroom. He was also given coffee and allowed to smoke. The interview was discontinued at approximately 10:20 p.m. (T. 755-758). During this session, the Petitioner admitted knowing Irene and giving her a ride, but indicated that he left her at the Sand Hill Bar. (T. 758). He also admitted knowing about a group called the Forces of Evil but said that he had been forced to write the letters by the organization. Petitioner admitted that he wrote the letters which had been received by the police and gave voluntary handwriting samples which matched the letters.

The interview was continued on the next day and the Petitioner was again advised of his rights. The interview began at approximately 8:00 a.m. and concluded at 3:30 p.m. when the Petitioner signed a written statement concerning each murder.

From the statements given by the Petitioner, it is clear that he went to the Sand Hill Bar on or about February 28, 1978. While there, the victim, Gail Jackson, attempted to solicit him for purposes of prostitution. The Petitioner agreed to pay her $20.00 and they got into his car and left. They drove about 200 yards up the road where they stopped. Once the victim began to undress, the Petitioner grabbed her and hit her with

a karate chop across her head. He then pulled her out of the car, dislocating her elbow. After he decided that the victim was still alive, the Petitioner got a jack handle from his car, and finding the victim to be breathing, repeatedly struck her in the face. Hance v. State, 245 Ga. at 856. Petitioner indicated that he wrote the letters to the police to try to throw suspicion off of himself and even placed an army cap with a different unit insignia than his own near the crime scene to avert suspicion. Id. at 857. This all took place prior to any letter being received from the Forces of Evil.

Petitioner also indicated that on March 15, 1978, he went to Vice Mitchell's Bar. He told the authorities that Irene Thirkield asked him for a ride to the Sand Hill Bar and then attempted to solicit him for purposes of prostitution. He again became angry and attacked her in the same manner as he had the first victim. He further admitted calling the military police on March 30, 1978 and telling them where to find the body of Gail Jackson. Id. at 857.

After confessing to the military authorities, the Petitioner also gave a statement to the Columbus authorities. He told them where he had disposed of the murder weapons and the clothes of the victims. A fingerprint from one of the letters was also determined to be that of the Petitioner.

Prior to trial, Petitioner was appointed counsel by the court. Mr. Richard O. Smith and Mr. Walter Johnson were to represent the Petitioner. Numerous motions were filed on Petitioner's behalf, including requests for psychiatric examinations. Petitioner was sent to Central State Hospital and examined and was also examined by a private psychologist in Columbus. No question was raised by the Petitioner or his attorneys as to

his competence to stand trial. In fact, Petitioner insisted that no further psychological testing be done. (November 27, 1978, hearing transcript at 5-6). At that time, Mr. Richard Smith made a motion to allow the Petitioner to participate in his own trial as co-counsel. The court conducted an extensive examination of the Petitioner and determined that the Petitioner was making this decision knowingly and voluntarily. The court then indicated that Richard Smith and Mr. Johnson would serve as co-counsel, even though Petitioner would be lead counsel. (November 28, 1978, hearing transcript at 11).

Petitioner participated in his own trial, conducting examination of witnesses and making argument to the jury. Mr. Richard Smith also conducted examination of some of the witnesses and presented argument to the jury at various points in the trial. At all times, Petitioner maintained his innocence in the crime. Petitioner has continued to act in his own behalf by filing a brief with the Supreme Court of Georgia, this Court after the denial of his original petition for a writ of certiorari and the Superior Court of Butts County.

At the conclusion of the trial, the jury found the Petitioner guilty of murder and the crime of criminal attempt, theft by extortion. The jury was presented with one aggravating circumstance at the sentencing phase and returned a recommendation of the death penalty based on a finding that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. Thus, Petitioner was sentenced to death on that charge.

Further facts will be developed as necessary for a more thorough illumination of the issues presented by the instant petition.

## PART TWO

## REASONS FOR NOT GRANTING THE WRIT

### A. THE STATE HABEAS CORPUS COURT PROPERLY CONCLUDED THAT THE ALLEGATION CONCERNING THE ADMISSIBILITY OF PETITIONER'S CONFESSION WAS WITHOUT MERIT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

In the first ground raised in the instant petition, Petitioner challenges the ruling by the state habeas corpus court concerning the admissibility of Petitioner's confession at trial. In raising this allegation, Petitioner overlooks the fact that this Court is not reviewing the decision by the Supreme Court of Georgia on direct appeal in the instant case, but the decision by the state habeas corpus court. A prior petition for a writ of certiorari has been filed and ruled on challenging the decision of the Georgia Supreme Court on direct appeal. See Hance v. Georgia, supra.

In the instant case, the state habeas corpus court considered the challenges to the admission of Petitioner's confession, including the allegation that the arrest was without probable cause. The court held, "The Supreme Court has already concluded probable cause for the seizure and arrest of Petitioner existed. (Cites omitted). Further, implicit in the Court's conclusion that Petitioner's statements were freely and voluntarily given is the finding that the interrogation of Petitioner was not illegal. (Cites omitted). Accordingly, the allegations in Paragraphs 7 and 8 are found to be without merit." (Habeas corpus order at 2).[4/] In considering other allegations challenging the confession, the court later merely noted again that the Supreme Court of Georgia

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4/ The order of the state habeas corpus court was submitted by the Petitioner as Appendix C.

had decided that the confession was properly admitted. (Habeas corpus order at 12).

Under Georgia law, issues covered on direct appeal are not cognizable in a state habeas corpus proceeding. After an appellate review has been conducted, the same issue will not be reviewed again in a proceeding on a writ of habeas corpus in state court. Treadwell v. Hopper, 235 Ga. 241, 219 S.E.2d 155 (1975); Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974). In the instant case, as noted by the state habeas corpus court, the question of the admissibility of Petitioner's confession was determined on direct appeal. The court found that the confession was freely and voluntarily given and properly admitted after a Jackson v. Denno hearing at trial. Hance v. State, supra 245 Ga. at 858. The court also concluded that there was probable cause for the arrest of the Petitioner. Id. at 863-4. Thus, this issue was clearly covered on direct appeal and the state habeas corpus court did not actually address the constitutional issue but relied on the state law requiring it to defer to the holding of the Supreme Court of Georgia.

This Court has long declined to review state court judgments based on adequate and independent state grounds, as long as there is no discrimination merely because a federal question is involved. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, 324 U.S. 117, 118 (1944). The adequate state ground in the instant case is the state procedural requirement prohibiting a state habeas corpus court from addressing the issues already decided on direct appeal. Petitioner's opportunity to have challenged the ruling of the Supreme Court of Georgia came in the petition for a writ of certiorari following that decision, not at a later time challenging the decision of a different court.

The state ground relied upon in the instant case clearly serves a legitimate state interest by establishing the finality of an appellate court decision. As this requirement does not discriminate merely on the grounds that a federal question has been raised, the decision of the state habeas corpus court properly relied on an adequate and independent state ground. Thus, the Petitioner has failed to show that the disposition of the federal question in the instant case was necessary to the decision by the Superior Court of Butts County. Therefore, this Court should decline to consider this issue. Stembridge v. Georgia, 343 U.S. 541, 547 (1952).

B. THE STATE COURTS HAVE PROPERLY DETERMINED THAT PETITIONER'S CONFESSION WAS ADMISSIBLE AND THAT THERE WAS PROBABLE CAUSE FOR AN ARREST.

Even if this Court decides that there was not an adequate and independent state ground for the state habeas corpus court's decision concerning the admissibility of Petitioner's confession, Respondent asserts that this issue was correctly decided by the state courts.

The main thrust of this allegation by the Petitioner is based on an allegation that there was no probable cause for an arrest of the Petitioner by the military authorities. Petitioner also attempted to rely on a decision by the military courts in the instant case. Before addressing the legal points, some factual development is necessary.

Prior to the questioning of the Petitioner, phone calls had been made to the military police and the Columbus Police Department

indicating where bodies of two victims of recent murders could be found. The individual making the phone calls indicated that he was calling on behalf of the Forces of Evil, referring to the letters that had been written to the police chief threatening the life of two of these victims. The individuals receiving the telephone calls testified that the voice was that of a young black male. The bodies were also found in the areas described by the person making the telephone calls. Due to the thoroughness of the decriptions given in these telephone calls and the indication of a familiarity with the military reservation, and the fact that metric terminology was used by the caller, the authorities felt that the person was a soldier at the Fort Benning base. This reasoning was supported by the fact that the letters written from the Forces of Evil had been written on United States Army stationery. Once the bodies were discovered, a military cap was also found near one of the crime scenes, thus further indicating that the individual was connected with Fort Benning.

Witnesses testified that a black male was seen with Irene Thirkield on the last time she was seen alive. One witness in particular indicated that this person was the Petitioner. The evidence showed that Petitioner gave her a ride on March 15, 1978. All of this evidence was presented at Petitioner's trial in state court, evem though no challenge was made to his arrest. As no challenge was made, all evidence available was not presented before the court to show probable cause.

In addition to the above evidence, testimony was given before the state habeas corpus court from Marvin D. Besson and Richard Fox. Mr. Besson testified that he participated in the investigation of the murder of Irene Thirkield as well as another victim and that he knew that the Petitioner had been seen with one of the murder victims. Mr. Besson also believed that the Petitioner

had made a telephone call to the military police telling where a body could be found. A tape recording was made of the telephone call received by the Fort Benning authorities on April 3, 1978. This tape recording was played to the Petitioner's company commander and first sergeant. They both stated that they believed that the voice was that of the Petitioner. Agent Fox testified that the Petitioner had been into his office several times and discussed the murders of Brenda Jackson, Irene Thirkield and Karen Hickman.[5/] Agent Fox also indicated that Petitioner had been relating information concerning the death of Private Hickman near the time when the body of Irene Thirkield had been found on the military base.

"Probable cause for an arrest existswhere the facts and circumstances within the knowledge of the arresting officer and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Brinegar v. United States, 338 U.S. 160 (1949)." United States v. Irurzun, 631 F.2d 60, 62 (5th Cir. 1980), quoting United States v. Ashcroft, 607 F.2d 1167, 1170 (5th Cir. 1979). The Fifth Circuit also noted in Irurzun that the evidence was to be examined in a light most favorable to the verdict in determining whether probable cause existed. A showing of probable cause requires much less evidence than that required to convict.

As noted by the Supreme Court of Georgia, the evidence in the possession of the military authorities was sufficient to "lead a reasonably cautious person to believe that Appellant had committed the offense." Hance v. State, 245 Ga. at 864.

Petitioner has challenged the fact that the decision by the

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5/ The murders of Irene Thirkield and Karen Hickman served as a basis for charges brought before the military authorities.

military court relating to the other two murders produced a different result than that of the Supreme Court of Georgia.6/ Although the Petitioner has cited to the decision by the Army Court of Military Review, the record in use by that tribunal is not before this Court. The only information available for this Court is the information set forth in the decision. The military tribunal noted that there were two basic facts on which the government rested its showing of probable cause, the first being the fact that the Petitioner was the last one seen with Irene Thirkield and the second being "the Appellant's previous dealings with the military police." United States v. Hance, 10 M.J. 622 (A.C.M.R. 1980).7/ The record does not reflect the presence of the additional evidence specifically cited by the Supreme Court of Georgia in support of its finding of probable cause, nor does the record reflect a consideration of the identification of the tape recordings. Thus, in the absence of the records from the military tribunal, this Court can only speculate on the exact evidence presented to that court and on the reasons for the differences between the decision of that court and the Supreme Court of Georgia.

The main determinative factor in the instant case should be the evidence in the record which is clearly sufficient to show probable cause. In considering all available information, including the evidence added at the state habeas corpus hearing,

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6/ It should be noted that this issue was presented in the pro se brief filed by the Petitioner in the Superior Court of Butts County in support of the petition for a writ of habeas corpus. Respondent noted at that time that none of the military proceedings were before that court for consideration.

7/ It should also be noted that in the military trial, a motion to suppress the confession based on the lack of probable cause was filed, whereas no such motion was filed in the state court.

Respondent submits that there was probable cause for an arrest of the Petitioner by the military authorities.8/

Petitioner asserts that the courts of the State of Georgia had departed from the rules set down by this Court in making the decision that there was probable cause. Clearly, as previously noted, the Supreme Court of Georgia followed the decisions of this Court in finding that there was probable cause to arrest based on a finding that there was sufficient information to lead a reasonably cautious person to believe that the Petitioner had committed the offense. This is clearly in line with the decisions by this Court.

Petitioner also attempts to assert that for some reason the length of the questioning of the Petitioner should require that the confession be excluded. Petitioner was questioned over a two day period by the military authorities. During this time, Petitioner continually made incriminating statements. Petitioner was at no time abused or mistreated, but was provided with meals and allowed to smoke. Petitioner was not questioned late into the evening, nor was he questioned in the early morning hours. The questioning continued based on the Petitioner's continued incrimination of himself. This should not be sufficient to require a confession to be excluded.

As the Respondent has shown that probable cause for an arrest did exist, there is no need to determine if any subsequent confessions were tainted in any manner. The existance of probable cause precludes any necessity for the consideration of this issue.

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8/ By making this argument, Respondent does not intend to abandon the argument that the Petitioner was not under arrest, but merely seeks to uphold the decision by the Supreme Court of Georgia concerning the finding of probable cause.

Petitioner goes on to challenge the admissibility of the confession, raising certain Miranda issues. The evidence submitted in the state trial clearly shows that the Petitioner was advised of his rights and signed a waiver of these rights. He was informed of the nature of the questioning, in that he was told that the interview pertained to the murder of Irene Thirkield. At no time did the Petitioner request an attorney or ask that the interview be terminated. No threats were made nor were any promises given to the Petitioner. Hance v. State, 245 Ga. at 859. Thus, the confession was made freely and voluntarily and was properly admitted at trial. Petitioner's challenge concerning his mental condition will be addressed in later allegations concerning his competency as will the allegation concerning a lawyer seeking for the Petitioner.

Respondent asserts that there was clearly sufficient evidence presented at the state trial to support a finding of probable cause. The evidence submitted at the state habeas corpus court makes the evidence in support of a finding of probable cause overwhelming. Thus, this allegation raised by the Petitioner is clearly without merit.

C. PETITIONER'S CONFESSION WAS PROPERLY ADMITTED BECAUSE THE PETITIONER NEVER REQUESTED AN ATTORNEY AND BECAUSE THE ATTORNEY ALLEGEDLY HUNTING THE PETITIONER WAS NOT BARRED FROM SEEING HIM.

At the beginning of this allegation, Petitioner overlooks two basic factual points. First of all, Petitioner asserts that an attorney was seeking "his client" and that the law enforcement officers lied to that attorney. As will be shown, neither of these are actually reflected in the facts presented at trial.

The evidence submitted at trial shows that Agent Fox and Agent Besson went to Petitioner's unit on April 4, 1978, and advised him that they would like to talk with him. Petitioner willingly accompanied the two agents to headquarters where he was advised of the nature of the matter which they wanted to discuss with him. Petitioner signed a waiver form and agreed to be interviewed without an attorney. (T. 683-684). According to Agent Fox, at no time during the entire period of the interview did the Petitioner indicate that he wished to have an attorney present. (T. 683).

The interview on the first day lasted from approximately 1:45 p.m. until approximately 10:20 p.m. Breaks were taken for an evening meal and to allow the Petitioner to go to the restroom. Petitioner was allowed to smoke, was furnished cokes and coffee and anything else that he requested. (T. 686).

Petitioner was taken to the bachelor enlisted quarters for the evening. The interview was scheduled to commence at 8:00 a.m. the next morning; however, when Agent Fox arrived at his office at approximately 7:30 a.m., Petitioner was there and

stated he was anxious to get started with the interview. Petitioner again was advised of all of his rights and again signed a waiver form. (T. 689-691). Shortly after the lunch break, Petitioner began admitting his direct participation in the crimes. After this, written statements were taken concerning all of the murders and Petitioner signed the statements. (T. 693-695). The interview concerning the particular case involved in state court concluded at approximately 3:15 p.m.

On the morning of April 6, 1978, Agent Fox learned that someone may have acquired an attorney for the Petitioner. He immediately informed the Petitioner of that fact and indicated that an attorney was looking him. The Petitioner expressed surprise and stated that "he guessed the whole world knows what I'm doing now." (T. 697). When asked if he wanted to talk with the attorney, Petitioner indicated that he did not. (T. 696-697).

On that same day, Petitioner was interviewed by Detectives Rowe and Day of the Columbus Police Department. He was again advised of his rights and again signed a waiver form. (T. 708-710). At no time during this interview did Petitioner indicate that he wanted an attorney or wanted to exercise any of his rights.

A Jackson v. Denno, hearing was held at trial concerning the admissibility of Petitioner's confession. Petitioner testified in his own behalf and admitted signing the waiver forms and being advised of his rights by Agent Fox. The only contradiction in Petitioner's testimony and that of the officers is that Petitioner asserted that after he signed the waiver, he requested to see an attorney. Petitioner then asserted that his confessions had been coerced by Agent Fox. At no time during the Jackson v. Denno hearing did Petitioner call

any attorney to testify as to his search for the Petitioner.

After the conclusion of the Jackson v. Denno hearing, and after the conclusion of the state's evidence, the Petitioner presented as his first witness Attorney David Clark. Mr. Clark testified that he attempted to locate the Petitioner after he heard of his arrest. (T. 908). Mr. Clark testified that he was not retained to represent the Petitioner and merely wanted to advise the Petitioner of his rights. Mr. Clark had previously represented the Petitioner in a divorce case, but did not handle any criminal matters and did not intend to represent the Petitioner in the criminal trial. (T. 915-917). Mr. Clark could not remember the exact days that he tried to contact the Petitioner or on what day he actually eventually saw the Petitioner. He testified that his purpose in trying to locate the Petitioner was only to make the Petitioner aware "of what his rights were, and be sure that he had the opportunity for counsel." (T. 915). Thus, Mr. Clark clearly was not Petitioner's counsel at this time, but had merely represented the Petitioner on a case in the past. Mr. Clark did not intend to represent the Petitioner in this case and had not been retained to represent him. Mr. Clark did indicate that he received a card from the jail signed by the Petitioner asking him to come and talk with him; however, this was apparently sent after the Petitioner had previously waived his rights and made the statements to the authorities.

Based on all of this testimony, it is clear that there was no attorney actually representing the Petitioner who was attempting to see him during the interview. Furthermore, there is no evidence that any individuals deliberately concealed the Petitioner's whereabouts from Mr. Clark. Mr. Clark was hunting for the

Petitioner during the time when he was being transfered from one facility to another and, thus, Mr. Clark was simply unable to locate him. There has been no evidence that any authorities misrepresented the facts to Mr. Clark. It is quite conceivable that the different departments did not have custody of the Petitioner at the time that they were asked by Mr. Clark. Once the authorities learned that Mr. Clark was looking for the Petitioner, the Petitioner was made aware of this fact. Clearly, the Petitioner specifically waived his right to counsel and even reaffirmed this waiver by declining to speak with Mr. Clark when informed by the authorities that Mr. Clark was looking for him. This is further supported by Petitioner's later decision to represent himself at trial.

The state habeas corpus court considered this allegation and determined that it was without merit. The court noted, "The attorney testified that he did not handle criminal matters, was not retained but simply wanted to advise the Petitioner of his rights...The agents interrogating Petitioner testified they did not know of the attorney's attempts to locate Petitioner, but when they learned of this fact they immediately told the Petitioner, who had already confessed, and he refused to see him." (Habeas corpus order at 3). Thus, this is clearly a case in which an individual made a voluntary waiver of the right to counsel and not a situation in which counsel was prohibited from seeing his client.

The situation in Escobedo v. Illinois, 378 U.S. 478 (1964), is factually distinguishable from the instant case, as are the other cases cited by the Petitioner. In Escobedo, the attorney apparently did represent the Defendant and the Defendant was at the same time asking to see his attorney. In State v. Jackson,

303 So.2d 743 (La. 1974), the court was faced with a situation in which an attorney had actually been retained to represent a defendant. The remainder of the cases cited by the Petitioner in support of his proposition all refer to an attorney trying to see "his client." This is clearly distinguishable from the instant case in which Mr. Clark clearly indicated that he had no intention of representing the Petitioner. Furthermore, in the instant case, as soon as the agents conducting the interview knew of the attempts by Mr. Clark to locate the Petitioner, they informed the Petitioner of this fact.

The Petitioner cites this Court to a provision in the Model Penal Code of Pre-Arraignment Procedure. The section cited by the Petitioner specifically refers to "an attorney undertaking to act as counsel for an arrested person". Model Penal Code of Pre-Arraignment Procedure § 140.7 (1975). The evidence is uncontroverted in the instant case that Mr. Clark was not undertaking to act as counsel for the Petitioner but was merely ascertaining that the Petitioner knew of his rights.

Petitioner also asserts that the evidence is uncontroverted that false information was given to Mr. Clark to delay communication. This is a blatantly incorrect statement of the facts as set forth at the trial. The uncontroverted evidence shows that the officers questioning the Petitioner knew nothing of Mr. Clark's search until after the Petitioner had given statements. No evidence is presented to show that any information given to Mr. Clark by the various authorities was incorrect. The Petitioner was in different locations during the several days in question and it would be quite easy for confusion to result as to his whereabouts. Mr. Clark testified that he was unsure of the date on which he started to look for the Petitioner.

He related his inquiry as follows:

> "I looked at the article [in the newspaper] to see exactly what it said, and then called the Columbus Police Department and asked them if they had Mr. Hance there, and they told me they didn't, that they believed he was at Fort Benning. I called the County Jail and they told me they thought he was at Fort Benning. I called the stockade at Fort Benning, they said he had been sent to Columbus, they didn't have him."

(T. 907-908). Later when Mr. Clark went by the Police Department, one of detectives indicated that they did not have the Petitioner. At no point has it ever been shown in the record that any of the statements made by any of the authorities were incorrect. Thus, Petitioner's allegation that false information was presented is not supported by the record.

Petitioner also asserts that he was "interrogated constantly by relays of police officers...until he confessed." Once again, the evidence does not support this factual conclusion. Petitioner was questioned by two agents from the military criminal investigation division at Fort Benning. This interview began on one day and was conducted for approximately ten hours with breaks being taken throughout that time. Petitioner was questioned on the second day for approximately eight hours, once again with breaks being taken. This hardly constitutes a constant interrogation as asserted by the Petitioner.

Petitioner also complained of his waiver of his right to counsel at the time of making this confession. Clearly, the

evidence submitted at the Jackson v. Denno hearing is sufficient to support such a waiver. Petitioner signed a waiver of counsel form and indicated to the authorities that he wished to waive his right to counsel. The only evidence presented in contradiction to this is Petitioner's one statement that he did request an attorney. The state clearly established by a preponderance of the evidence that the waiver was knowing and voluntary. See Lego v. Twomey, 404 U.S. 477, 489 (1972).

It is clear from the evidence in the record that Petitioner was not denied his right to have an attorney present. The law enforcement officers did not misinform Mr. Clark. He merely talked with officers who did not know Petitioner's location. Furthermore, even when Petitioner was advised of Mr. Clark's presence, he declined to talk with him. Mr. Clark was not acting as counsel for the Petitioner, but was merely ascertaining the Petitioner knew of his rights. Thus, the evidence clearly supports a finding that Petitioner made a knowing and voluntary waiver of counsel and that no attorney who represented the Petitioner was precluded from seeing him. Thus, this allegation is clearly without merit.

D. THE TRIAL COURT WAS NOT REQUIRED TO CONDUCT A SUA SPONTE COMPETENCY HEARING AND PROPERLY ALLOWED THE PETITIONER TO ACT AS LEAD COUNSEL AT HIS TRIAL.

Petitioner raises two challenges based on his alleged competency at the time of his trial. The first of these challenges is addressed to the fact that the trial court did not conduct a sua sponte competency hearing prior to the trial. The second allegation is addressed to the inquiry made by the trial court when determining that Petitioner should be allowed to act as lead counsel at his trial.

In considering the first half of this allegation, it is relevant to note that the first of Petitioner's argument at the state habeas corpus hearing was that the trial court did not properly determine that he was competent to act as counsel and was not addressed to Petitioner's competency to stand trial. No evidence was presented to show what the trial court knew concerning Petitioner's competency, nor was it ever asserted that a competency hearing should have been held sua sponte by the court. This fact is readily apparent in considering the order of the state habeas corpus court. The findings of fact and conclusions of law relating to this allegation in the habeas corpus court are all directed to Petitioner's decision to act as his own counsel, not to Petitioner's actual competency to stand trial. Thus, Respondent asserts that this particular allegation has not been raised and addressed at any time prior to the instant petition. Thus, this Court should decline to review this question. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Even with this issue properly before the Court, it is clear that no evidence was ever presented to show that the trial court knew of sufficient facts to require it to conduct a sua sponte competency hearing. The only evidence in the record from the trial court concerning Petitioner's competency is found in the hearing conducted on November 27, 1978, to decide various motions presented by the defense.[9/] At that time Mr. Richard Smith, appointed counsel for the Petitioner, stated as follows:

> "Mr. Smith [the district attorney] has sent Mr. Hance to the Central State Hospital in Milledgeville, Georgia, with the evaluation and examination and it is my understanding from the information we received from them that it was their feeling that he was competent to aid and assist us as co-counsel and as a defendant in the case. We have also had Mr. Hance examined by Mr. Lewis Lieberman, who is a psychologist here in Columbus. Mr. Lieberman suggested that there may be some character disorder that might be further examined to determine Mr. Hance's present mental status. However, he talked with Mr. Hance and he [Mr. Hance] has requested that no further psychiatric examination be made or taken. He feels this to be a rational request and in view of what Mr. Lieberman has said and what they also said has been done at Central State Hospital, it seems like

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9/ The transcript of this hearing is submitted as a part of the Appendix to the Brief in Opposition to Certiorari.

> he is competent to make this request or he has requested that he be allowed to participate as we [sic] counsel in this case and to handle the primary body of the proceeding."

(November 27, 1978, transcript at 5-6).) No other evidence was presented to the court at that time concerning the competency of the Petitioner.

Although Petitioner has included several letters in the appendix to his petition, these letters do not appear anywhere in the record from the trial court. Two of the letters are from personnel at Central State Hospital and are addressed to Judge John H. Land. Judge Land did not conduct the trial in the instant case, although we can speculate that these were presented to the trial judge. The first of these letters indicates that Mr. Hance was aware of courtroom procedures and knew the charges against him and was competent for trial. A further letter from Dr. Wildman indicated a little more detail concerning the results of the tests given to Mr. Hance, emphasizing the types of people that normally have similar profiles to that suggested by the testing. At no time did Dr. Wildman state that Petitioner was incompetent to stand trial. A third letter was included in the appendix from Dr. Lewis Lieberman to counsel for Mr. Hance. This letter is marked confidential and there is no evidence that it was presented into the record. Furthermore, Dr. Lieberman merely speculates as to Petitioner's ability to assist in his own defense based on his alleged inability to see the situation from a different point of view than his own. The final letter is from a Dr. Begley and is addressed to Dr. Lieberman. Once again, there is no showing that this was ever placed into the record. This letter is based only on the results of Rorschach

tests that were sent to him. Apparently, Dr. Begley did not ever see or personally examine the Petitioner. The letter also does not indicate that Mr. Hance would be incompetent to stand trial.

The only indication anywhere in the record as to the evidence within the knowledge of the trial judge is seen from the report of the trial judge.[10/] In that report, the trial judge is specifically asked to relate the pertinent psychiatric and psychological information revealed. The judge in this case stated as follows:

> "Good physical condition; dull-normal intelligence; anxious, depressed, apathetic; expressed feelings of worthlessness. No previous mental health contact. Not psychotic."

(Report of trial judge, 1). Attached to this report is a letter from Petitioner's trial counsel, Mr. Richard O. Smith. In that letter, counsel states that evidence was introduced at a pre-trial hearing concerning Dr. Lieberman's examination, although no such actual documentary evidence appears in the record. Counsel stated that from Dr. Lieberman's report there was some definite character disorder, but that the Petitioner himself specifically requested that the matter not be pursued any further. (Report of trial judge).

Petitioner bases a large portion of his argument that he was incompetent to stand trial on evidence not available to the trial judge at the time this decision was made. Petitioner takes the letters written from the Forces of Evil to the police department and asserts that these show that he was mentally incompetent. It should be noted that these letters were not

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[10/] The report of the trial judge is included as a part of the appendix to this Brief in Opposition to Certiorari.

presented to the court until they were introduced as exhibits during the trial. Thus, the court could not possibly have any indications as to Petitioner's competence from these letters. Furthermore, rather than being "replete with ravings," these letters actually show a deliberate and concerted effort to throw suspicion off of the Petitioner and to build a cover story concerning the murders. Rather than these letters showing that Petitioner is incompetent, they actually show that Petitioner was intelligent and had sufficient mental ability to concoct such a deception. Petitioner also refers to the manner in which the killings were conducted. This also did not come out until during the trial and was shown from the confessions of the Petitioner. This is clearly not evidence that was available to the trial judge prior to the trial being conducted. Furthermore, evidence concerning the manner in which the victims were killed could possibly relate to Petitioner's sanity at the time of the crime, but would not necessarily have any reflection on his competency to stand trial.

From the evidence, the trial court apparently knew that Petitioner had received psychiatric and psychological examinations. The trial court also knew that Petitioner had been found competent by the doctors at Central State Hospital. There is some indication that the judge knew that one doctor had indicated that the Petitioner had some character disorders, but nothing was presented sufficient to show that Petitioner was in any manner incompetent to stand trial. Furthermore, the court questioned Petitioner thoroughly on that same date to determine Petitioner's ability to act as counsel. Under these situations, a hearing as to competency was not required, particularly in view of the fact that Peti-

tioner himself insisted that no further psychiatric proceedings be held.

This Court's decision in Pate v. Robinson, 383 U.S. 375 (1966), relied on by the Petitioner, did address the issue of a trial court's obligation to conduct a sua sponte competency hearing. In Pate, there was uncontroverted testimony from at least four witnesses concerning a long history of disturbed mental behavior. There was testimony that the Defendant had been hit on the head with a brick as a young child and had shown very erratic conduct over the years. He had tried to commit suicide on one occasion and had even killed his own son prior to the murder involved in Pate. Four defense witnesses stated that the Defendant was insane. Id. at 378. The record also revealed that defense counsel insisted throughout the trial that the Defendant's present sanity was in question and the prosecution even suggested that the psychiatrist needed to be present to testify as to sanity. Id. at 384. The decision in Pate rested on the fact that the trial court blatantly ignored uncontroverted testimony of a prior history of mental problems, including hospitalization for these mental problems. In the instant case, there is no such evidence found in the record. The Pate decision presents a factual situation involving a record filled with evidence concerning the Defendant's incompetency, whereas in the instant case, any evidence which might be present supported a finding of competency.

Under Pate and later decisions, it is generally determined that a court must conduct a sua sponte inquiry into a defendant's competency if sufficient doubt exists as to the competency to stand trial. Pate, supra; Acosta v. Turner, 666 F.2d 949 (5th Cir. 1982). Acosta presented a factual

situation similar to that in Pate in that considerable psychiatric evidence was presented, including the fact that the Defendant had been treated for a year and a half at a state hospital based on a prior finding of incompetence. The court in Acosta expressed its own concern with the Defendant's competency by returning Defendant for further examination before imposing sentence. Once again, this is completely distinguishable from the instant case.

The trial court in the instant case had no knowledge of any past medical or mental history, nor has any been shown at this time. There is no evidence that Petitioner's behavior at trial suggested any question of incompetency, nor was the opinion of any of the experts sufficient to require such a hearing on competency. Thus, Respondent asserts that the trial court was not required to conduct a hearing on Petitioner's competency, particularly in light of Petitioner's insistence that no further psychiatric examination be conducted and that such a path not be pursued.

Petitioner's second allegation in this regard relates to his competency to act as co-counsel. This was the thrust of the allegation presented in the state habeas corpus court. Petitioner has asserted that the trial court did not follow the requirements of Faretta v. California, 442 U.S. 806 (1975), and did not properly determine that he knowingly and intelligently gave up the benefits associated with the right of counsel.

It is clear under the law of the State of Georgia as well as the United States that an individual has the right to represent himself in state or federal court. Faretta, supra. The State Constitution of Georgia also provides that an individual has the right to proceed either pro se, by counsel or

both. Ga. Const. Art. I, Sec. I, Par. IX (Ga. Code § 2-109). It is also well-established that an individual must knowingly and intelligently forego the benefits that he relinquishes if he determines to proceed in his own behalf. However, a Defendant need not have the skill and experience of a lawyer in order to be able to choose self-representation. Technical legal knowledge is not relevant to an assessment of the knowing exercise of a right to defend one's self. Faretta, supra, at 836.

As noted previously, a hearing was conducted on November 27, 1978, at which time the Petitioner's motion to act as his own counsel was heard. At this hearing the court was made aware that the Petitioner had been sent to Central State Hospital by the state for an examination. Although there was some indication that Dr. Lieberman found a character disorder, Petitioner specifically requested that no further psychiatric examination be conducted.

Contrary to Petitioner's assertion, the trial court conducted a thorough examination at that time into Petitioner's decision to represent himself. The district attorney specifically asked the court to make an inquiry into this matter. The following colloquy transpired:

"THE COURT: Mr. Hance, have you ever witnessed a trial in progress before, trial of a criminal case?

MR. HANCE: Yes.

THE COURT: Are you aware that this is what is termed a capital case in which the maximum penalty might call for execution?

MR. HANCE: Right, sir.

THE COURT: Do you feel that you are competent to handle this case from a physical standpoint, emotional, mental standpoint?

MR. HANCE: Right, sir.

THE COURT: You understand that the Court will see to it that your rights are protected in the case, of course, but one of the rights being that you are entitled to be represented by counsel. At this point you are represented by counsel. You also have the right to represent yourself, do you understand these?

MR. HANCE: Right, sir.

THE COURT: And you are willing to allow Mr. Smith [Mr. Richard Smith], then, to consult with you, participate in the trial according to your instructions and your directions?

MR. HANCE: Right, sir.

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THE COURT: All right, sir. For the purposes Mr. Hance, let me ask you: Have you had any legal training of this type yourself?

MR. HANCE: Just, I just watched, your Honor.

THE COURT: You have never participated as an Attorney?

MR. HANCE: No, sir.

THE COURT: But, do you realize the trial of the case is subject to any number of rules having to do with the admissibility of evidence, the procedural rules as to who gets to proceed when and in what fashion and that the Court must make the determination of how the rules are to be followed?

MR. HANCE: Right, sir.

THE COURT: Do you feel that you are so well versed in these proceedings and rules and the substance of the law that you can give yourself adequate representation in your own case?

MR. HANCE: Also with my attorney here for the rules. So that will keep me from breaking any laws while I am here."

(November 27, 1978, transcript at 7-9). The court then went on to question the Petitioner further concerning his knowledge of the court's ruling on objections and his conduct during the hearing. The court specifically instructed Mr. Richard Smith to advise Petitioner fully during the trial and to assist in whatever manner Petitioner desired. He also instructed the Petitioner that he could redesignate anyone he chose as lead counsel at any time during the case.

Richard Smith informed the court at the hearing that Petitioner was proceeding against Mr. Smith's advice. He also told the court that the Petitioner did not want to discuss trial tactics with Mr. Smith. This further indicates Peti-

tioner's explicit desire to proceed in his own behalf and not to rely on counsel.

At the conclusion of the trial, Mr. Richard Smith introduced an agreement signed by Petitioner prior to trial. The agreement reads as follows:

> "I, William Henry Hance, have decided of my own free will to handle the trial of my case by myself. Attorney Richard O. Smith has advised me of the dangers in being my own attorney. I have not advised Mr. Richard O. Smith nor his assistant, Walter F. Johnson, Jr. of what my defense is nor of the name or expected testimony of any one of the witnesses that I intend to call.
>
> It was my feeling that I was competent to handle my own case."

(R. 20; T. 1034). This statement was signed by the Petitioner and notarized. At the time it was introduced, the court asked the Petitioner if he signed the statement and if it was correct. Petitioner responded that he did and that the statements were correct.

From the statements signed by the Petitioner, it is clear that his attorney did advise him of all of the dangers involved in representing himself. Although the court did not set forth these dangers specifically, the court did make a sufficient inquiry to determine that Petitioner was making a knowing and voluntary decision to proceed in his own behalf. Petitioner was thoroughly questioned by the court and the court

made a decision that Petitioner's choice was knowing and voluntary. It should also be specifically noted that two appointed attorneys sat with the Petitioner and assisted him actively throughout the trial.

Respondent submits that the record is clear that Petitioner freely and voluntarily made an intelligent decision to forego the traditional benefits associated with the right to counsel. The trial court complied completely with the requirements of Faretta v. California, supra. Furthermore, this is not a case in which Petitioner was completely without counsel. Petitioner had two attorneys actively assisting him throughout the trial in conducting much of the examination of witnesses and even presenting argument in Petitioner's behalf. It is also relevant to note that Petitioner has continued to file briefs in his own behalf since his trial and, thus, has continued to assert his right to self-representation. Thus, it is clear that this allegation is without merit.

E. THE STATE HABEAS CORPUS COURT PROPERLY DETERMINED THAT THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Petitioner has presently challenged the effectiveness of his trial counsel based on alleged omissions on the part of counsel. Petitioner also attempts to assert that this Court needs to grant certiorari to determine what standard will be applied in considering the effectiveness of trial counsel. Respondent asserts that this is totally unnecessary, because as noted in the petition, most federal courts apply a similar standard. The standard applied by the state habeas corpus court is the same as that employed by the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals and is one of the more strict standards for governing the effectiveness of counsel.

The new Eleventh Circuit Court of Appeals has recently held, "The law on effective assistance of counsel is well-settled. Although a criminal defendant is entitled to counsel reasonably likely to render and actually rendering reasonably effective assistance, reasonably effective assistance does not mean assistance without error." United States v. Gibbs, 662 F.2d 728 (11th Cir. 1981). This is the same standard used by the former 5th Circuit and presently used by the state courts of Georgia. See MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974). It is also well-recognized that a consideration of the effectiveness of counsel requires an inquiry into the actual performance of counsel and a determination whether representation was reasonably effective must be based on the totality of the circumstances. United States v. Gibbs at 730; Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980). Thus, in order

to determine if Petitioner received effective assistance of counsel, this Court must examine the actions of counsel in light of the entire trial.

A critical factor in examining the effectiveness of counsel in the instant case is Petitioner's insistence on representing himself at trial. Although Petitioner did agree to allow Mr. Richard Smith and Mr. Johnson to assist him and to act as co-counsel, Petitioner did not inform them of any of his tactics or defenses. This initially presented both Mr. Smith and Mr. Johnson with a considerable handicap. Furthermore, Respondent asserts that as Petitioner did assert his right to self-representation, he should not now be allowed to complain that the quality of the representation he received amounted to a denial of effective assistance of counsel. See United States v. Rowe, 565 F.2d 635 (10th Cir. 1977). This should be true even though Petitioner did have co-counsel in the instant case, when the Petitioner specifically refused to present certain information to such counsel.

In the instant case Petitioner himself started to conduct the voir dire examination and then relinquished control of that examination to Mr. Richard Smith. Petitioner subsequently cross-examined approximately thirteen of the state's witnesses and presented a closing argument on his own behalf. At one point during the trial Petitioner presented certain papers to the trial court which he had not allowed Mr. Smith to see nor had he consulted with Mr. Smith about these papers. (T. 598-600). When Petitioner decided to testify at the Jackson v. Denno hearing, Mr. Smith indicated that he would have to allow Mr. Hance to merely testify without Mr. Smith asking questions, as Petitioner had not informed Mr. Smith what he intented to say. (T. 736).

Petitioner himself made the decision as to what witnesses would be called in his defense and as to what evidence would be presented in mitigation. Thus, he can hardly be allowed to challenge the effectiveness of his co-counsel at this time when these decisions were made by the Petitioner on his own. Counsel can hardly be expected to call witnesses to testify when he has no knowledge of their existence.

In spite of Petitioner's insistence on representing himself and the fact that he should be considered to have waived this particular allegation, Respondent asserts that the evidence shows that Mr. Richard Smith and Mr. Walter Johnson rendered reasonably effective assistance under the facts of this case. Mr. Richard Smith was the main assistant to the Petitioner during the trial, although Mr. Johnson was present and did assist somewhat. Prior to trial, Mr. Smith filed a motion for a complete recordation of the proceedings (R. 8; M.T. 3) 11/; motion for individual voir dire and the sequestration of the jurors (R. 9-10; M.T. 3); motion to prohibit jury dispersal (R. 11; M.T. 3); a Brady motion and a motion to compel disclosure (R. 12-14; M.T. 4); the motion to allow Petitioner to participate as co-counsel (R. 15-16; M.T. 5); and a motion for a change of venue. (R. 17; M.T. 13). This last motion was withdrawn at the request of the Petitioner himself. Mr. Smith also filed a motion requesting funds for the examination conducted by the independent psychologist. This motion was subsequently granted. (R. 28). Mr. Smith filed the motion for a new trial and also filed a notice of appeal and the brief on direct appeal in conjunction with Mr. Alex Byars. (R. 1, 25).

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11/ M.T. refers to the transcript of the hearing on these motions conducted on November 27, 1978. This transcript is included in the appendix with this brief.

Mr. Richard Smith conducted the general voir dire of the potential jurorsand after Petitioner examined one juror individually, Mr. Smith continued the remainder of the examination of these jurors. Petitioner now asserts that counsel failed to have one particular juror excused for cause based on her alleged indication of bias. This was potential juror Brenda T. Owens. (T. 294-298). In considering the jury selection process, it is clear that, while this juror was not excused for cause, it was also not necessary for the defense to use a peremptory strike to have her removed from the jury. Twelve jurors were chosen well before Ms. Owens was ever presented to counsel for consideration. Three alternates were also chosen, with the final alternate being Mr. John Jones who was the juror immediately preceding Ms. Owens. (T. 390). Thus, this could hardly be considered ineffective assistance of counsel when the juror did not serve on the Petitioner's jury and when it was not even necessary to use a peremptory strike to remove her from the jury.

Throughout the trial, Mr. Smith exhibited numerous actions showing his effectiveness. He requested that no one be allowed to bring newspapersinto the courtroom to prevent headlines from being exhibited to the jury. (T. 396). Mr. Smith made approximately forty different objections throughout the trial to various questions, pieces of evidence and comments by the prosecution, including an objection to the opening statement by the prosecution. (T. 414, 437, 449, 454, 461, 462, 467, 468, 473, 475, 489, 497, 518, 533, 568, 607, 615-617, 622, 631, 636, 659, 711, 743, 754, 851, 901, 916, 1034, 1059). Counsel also moved for a directed verdict concerning the extortion charge and requested that the court bring the jury back to present a charge on venue. (T. 1036, 1103). Counsel had the jury polled both after the guilty verdict and after the sentence.

Mr. Smith presented a lengthy argument on behalf of the Petitioner at the guilt-innocence phase of the trial and also presented argument during the sentencing phase. (T. 1042-1053; 1164-1176). Three witnesses were called in Petitioner's behalf at the guilt-innocence phase and Petitioner testified in his own behalf at the sentencing phase.

In addition to performing all of the above as counsel, Mr. Smith assisted the Petitioner when Petitioner was acting in his own behalf. Numerous conferences were held between the two during the trial as can be seen from the transcript. (T. 495, 601, 613, 720, 808, 906, 979, 985, 1033). Mr. Smith conducted the cross-examination of the various expert witnesses as well as certain other witnesses presented.

All of this evidence clearly supports the finding by the state court that Mr. Smith "prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and lack of cooperation by Petitioner. The effort Mr. Smith put forth was certainly reasonably effective within the meaning of the standard." (Habeas corpus order at 12).

Petitioner has raised certain specific points that he alleges make Mr. Smith's assistance ineffective. The majority of these allegations relate to the failure to make certain objections or to present certain witnesses. All these allegations are clearly a matter of trial tactics and strategy and are not sufficient to show ineffective assistance of counsel, particularly when the strategy and tactics were decided by the Petitioner himself and not Mr. Smith. Furthermore, when an allegation of ineffective assistance of counsel is premised on specific acts or omissions of counsel it is generally held

that these allegations must be supported by a showing of injury or prejudice to the Petitioner. Lovett v. Florida, 627 F.2d 706 (1980). It is not for later courts to speculate as to the possible reasons counsel may have had for failing to object. Tyler v. Phelps, 643 F.2d 1095, 1100 (5th Cir. 1981). Furthermore, tactical decisionswill not constitute ineffective assistance simply because, in retrospect, it may appear that counsel made the wrong chose. Beckham v. Wainwright, 639 F.2d 262, 265 (5th Cir. 1981).

Petitioner mentioned numerous complaints against his counsel under the statement of the case which were not later reiterated in the body of his petition; however, Respondent will briefly address these allegations at this time. Furthermore, certain allegations were raised i.. which Petitioner asserted that counsel was ineffective for failing to object when it was not later stressed that these charges or pieces of evidence were erroneous. Respondent will also address these briefly.

Petitioner initially asserted that his attorney was ineffective for failing to object to the legality of his arrest. Respondent has previously noted that, while it is not conceded that Petitioner was even under arrest, there was clearly sufficient evidence to support a finding of probable cause to arrest the Petitioner.

Petitioner also alleges that counsel should have raised a defense of insanity and should have insisted on a competency hearing. It is hard to understand how this ground can be raised at this time when the main reason this was not done prior to trial is due to Petitioner's own insistence that it not be done. Mr. Smith indicated to the court that Petitioner refused to undergo any further psychiatric exams and wanted to proceed

with the trial. Furthermore, Petitioner has presented no evidence to show that he was insane at the time of the crime nor has he shown that he was incompetent at the time of trial.

Numerous complaints were made as to counsel's failure to object to the introduction of certain evidence and to certain comments by the prosecution. It has previously been determined that the evidence complained of was properly admitted at trial and that the prior arrest complained of was even commented on by the Petitioner himself in his own argument. In considering prosecutorial misconduct, this must be viewed in the context of the trial as a whole. In considering it this way, it is clear that there was no prosecutorial misconduct sufficient to render the trial fundamentally unfair. Thus, counsel was not ineffective for failing to object to any comments made by the prosecution. See Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981).

Petitioner also complains that his counsel failed to request a charge on venue and pursue the question of jurisdiction properly. Counsel constantly pursued the issue of whether jurisdiction should lie in state court or federal court and was under the impression that the trial court would give a detailed instruction on venue. After the court did not give such an instruction, counsel requested that it be given. The court indicated that it felt that the general charge was sufficient.

Petitioner complains that counsel did not properly object to the testimony of Dr. Carl Smith concerning a psychiatric examination of the Petitioner. (T. 980-1). Although counsel did not initially object, there was no need because Dr. Smith raised the question of the psychiatrist-patient privilege himself. This evidence was completely excluded by the court based on this privilege.

The allegation that counsel was minimally prepared to conduct cross-examination is clearly without merit. The cross-examination conducted by counsel was thorough and adequately covered all issues. The mere fact that counsel did not know until shortly before the witness was examined who would conduct the examination does not mean that he was not prepared.

Petitioner also asserts that Mr. Smith did not call witnesses at the sentencing hearing in his behalf. Once again, this relates to a tactical decision made by the Petitioner by himself. It was clearly stated by Mr. Smith at the beginning of the hearing that Petitioner only wished to present his own testimony and not call any other witnesses. Based on this fact, Petitioner can hardly now blame his co-counsel for failing to call any additional witnesses when he did not tell counsel any witnesses that would be available to call and when the specifically indicated that he did not want other witnesses called.

In the statement of the case, Petitioner indicated that the trial court's charge was burden-shifting and impermissible and that counsel should have challenged this charge. Petitioner did not challenge the charge in any of his reasons for granting the writ in his brief; however, Respondent will briefly address this charge.

The pertinent portion of the charge to the jury reads as follows:

> "I'm going to give you certain presumptions of law which are applicable in this case. A presumption is a conclusion that the law draws from given facts. Now, each of these presumptions is rebuttable, that is, they

are subject to being overcome by evidence to the contrary. Now, these are as follows: Every person is presumed to be of sound mind and discretion. This presumption may be rebutted. The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. But these presumptions may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts, and that's you the jury, may find such intention upon consideration of the words, the conduct, the demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

A specific intent to commit the crimes charged in this indictment, each count thereof, is an essential element that the State must approve beyond a reasonable doubt. Intent is always a question for the jury and it's ordinarily ascertained by conduct. Intent may be shown in many ways provided you find that it existed from the evidence produced before you. It may be inferred from the proven circumstances or by acts and conduct, or it may be presumed when it is the natural and necessary consequence of the act."

(T.1093-1094).

Petitioner has challenged this charge and the effectiveness of his counsel for failure to object to this charge and asserted that it was impermissibly burden-shifting. Respondent asserts that the charge as given and when considered as a whole, was permissible.

There exists no per se rule against charging the truism that a person is normally presumed to intend the natural and probable consequencies of his actions. United States v. Chiantese, 560 F.2d 1244, 1255-1256 (5th Cir. 1977). Thus, "the threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." Sandstrom v. Montana, 442 U.S. 510, 514 (1979), citing Ulster County Court v. Allen, 442 U.S. 140 (1979). In this regard, this Court stated as follows:

> "That determination requires careful attention to the words actually spoken to the jury, (cite omitted), for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."

Sandstrom, supra at 514.

As recognized by this Court, "Inferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime...from the existence of one or more 'evidentiary' or 'basic' facts." Ulster County Court, supra, at 156. The main test is whether the inference or presumption

undermines the responsibility given to the finder of fact at trial to find the ultimate facts beyond a reasonable doubt based on the evidence presented by the state.

This Court also distinguished between permissive presumptions or inferences and mandatory presumptions, noting that a permissive presumption or inference "allows but does not require the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and...places no burden of any kind on the defendent." Ulster County Court, supra, at 157. On the other hand, mandatory presumptions tell "the trier of fact that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." Id., at 157.

As noted by the state habeas corpus court, the charge in the instant case at most creates a permissive presumption or inference. It allows, but does not require, the jury to infer or presume certain facts once the state has proven other basic facts. The jury was specifically instructed that these presumptions could be retutted. The court went on to note that criminal intention would not be presumed and that a specific intent was an essential element. The jury was merely informed that they could either infer intent from proven circumstances or acts or conduct or could presume intent under specific circumstances.

The Supreme Court of Georgia has addressed a similar instruction in light of Sandstrom, supra and determined that the charge when viewed as a whole created merely a permissive presumption that places no burden on the defendant. Skrine v. State, 244 Ga. 520, 521, 260 S.E.2d 900 (1979). This finding

by both state courts is clearly supported when considering the charge as a whole.

As the charge merely creates a permissive presumption, the Petitioner must demonstrate that the instruction is invalid as it applies to him, that is, that in this particular case, he must show that there is no rational way a trier of fact could make the particular connection allowed by the inference. Ulster County Court, supra, at 157. As no such showing has been made in the instant case, the charge was clearly correct as applied to the Petitioner. Thus, counsel did not err in failing to challenge this charge.

Based on the totality of the circumstances, including Petitioner's insistence on representing himself and not confiding in his co-counsel, it is clear that Petitioner received effective assistance of counsel as set forth in the standard applied in the state courts and in the prevailing standard applied in the federal courts. Thus, this allegation by the Petitioner presents no federal question for review by this Court.

F. THE TRIAL COURT DID NOT EXCLUDE ANY RELEVANT MITIGATING EVIDENCE DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL.

Petitioner has asserted that the trial court excluded mitigating evidence during the sentencing phase of his trial. Respondent asserts that the evidence excluded was not relevant to the question of mitigation and, therefore, was properly excluded.

At the sentencing phase, the only evidence presented by the Petitioner in his own behalf was his own testimony. To facilitate the presentation of this evidence, Mr. Richard Smith directed questions to the Petitioner. Petitioner related information concerning his background, his brothers and sisters and the health of his family. Petitioner also testified about his background in the Marine Corps and in the Army. (T. 1121-1122). Petitioner testified that he had two children and that he loved both of them. (T. 1124).

After this information was elicited, Mr. Richard Smith proceeded with the following statement: "You told us just yesterday that you didn't kill these girls." (T. 1124). After Petitioner responded that he did not kill them, the district attorney objected because "that issue has been decided, its over and behind us, it cannot be in mitigation from punishment at this time." (T. 1124). A lengthy discussion was held between the district attorney, Mr. Richard Smith and the court concerning this question. The court finally decided

that Mr. Smith could continue, but he directed that the questions establish mitigation and not legal justification. Mr. Richard Smith then proceeded to ask the Petitioner if he believed that he did not kill the women and if he recalled having killed the women. (T. 1126). He was finally asked if he believe his testimony during the guilt-innocence phase to be true. The district attorney objected again at this point stating that it was merely a denial of the commission of the crime. Mr. Richard Smith indicated that he was trying to present evidence showing that the Petitioner did not believe that he committed the crime. As noted by the district attorney, "this is trying to imply some kind of mental issue in the trial which has not been raised by any competent evidence whatsoever during the course of the trial." (T. 1127). The court at that point sustained the objection. Mr. Richard Smith was allowed to continue and asked the Petitioner questions concerning whether he felt remorse about the crime. (T. 1128).

It is undisputed that there was no question raised as to the Petitioner's mental state at the time of the crime prior to the sentencing hearing. As a matter of fact, Petitioner had been submitted to two psychiatric examinations and had refused to continue with any further examinations. No evidence was produced in the state habeas corpus court to show anything further that Petitioner would have testified to had the objection not been made at the trial court. Petitioner was allowed to testify that he did not recall killing the women and was allowed to emphasize the fact that

he did not commit the murders or that he did not believe that he committed the murders. No further information was shown at the state habeas corpus court that the Petitioner could have been given that he was precluded from presenting to the jury.

In actuality, the court properly limited Petitioner's testimony to questions concerning mitigation as opposed to questions concerning guilt or innocence. Thus, the court merely restricted Petitioner's evidence to relevant mitigating evidence.

The instant case is clearly distinguishable from Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978). In both of those cases, this Court ruled that relevant mitigating evidence could not be excluded from the jury's consideration. Whether or not Petitioner actually committed the crime was not relevant at the time of sentencing as the jury had previously convicted him of the commission of the crime. Petitioner was allowed to testify that he did not recall committing the crime and that he believed his testimony was true. This is the extent of the relevance of any of this testimony and the court should be allowed to place some limitations on the admission of irrelevant evidence. Further, before determining that mitigating evidence was excluded, this Court should require that the Petitioner make some showing of what evidence would have been presented. It would appear from a consideration of the transcript that everything trial counsel sought to have included was presented to the jury. No further showing has been made of what evidence or statements the Petitioner could

have made.[12/]

Based on the above it is clear that no relevant mitigating testimony was excluded at the sentencing hearing. Thus, as found by the state habeas corpus court, the trial court acted within its authority and properly held the witness within reasonable hounds in presenting relevant mitigating evidence. Exclusion of testimony relative to guilt or innocence was not unreasonable or improper. Thus, this allegation presents no federal question for review by this Court.

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12/ It is relevant to note at this point that the Petitioner did not testify in his own behalf at the state habeas corpus hearing, and thus, did not make any statements concerning what else he would have testified to before the jury.

## CONCLUSION

For the above and foregoing reasons the petition for a writ of certiorari filed on behalf of William Henry Hance should be denied.

Respectfully submitted,

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for the Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3339

## CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition upon the Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper postage affixed thereto and addressed to:

Mr. Leonard M. Marks
Attorney at Law
595 Madison Avenue
New York, New York 10022

This 6th day of April, 1982.

Mary Beth Westmoreland
MARY BETH WESTMORELAND
Counsel of Record for the Respondent

No. 81-6352

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HENRY HANCE,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of Butts, County, Georgia

# APPENDICES

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IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

G E O R G I A

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| STATE OF GEORGIA, | ) | |
| | ) | |
| PLAINTIFF, | ) | |
| | ) | |
| VERSUS | ) | INDICTMENT NO. 39654 |
| | ) | |
| WILLIAM HENRY HANCE, | ) | |
| | ) | |
| DEFENDANT. | ) | |
| - - - - - - - - - - - - - - - - | ) | |

HEARING BEFORE

THE HONORABLE KENNETH FOLLOWELL,

JUDGE

COLUMBUS CONSOLIDATED GOVERNMENT CENTER

COLUMBUS, GEORGIA

November 27,1978

* * * * * * * * * *

A P P E A R A N C E S

THE HONORABLE WILLIAM SMITH, District Attorney for the Chattahoochee Judicial Circuit of Georgia, Columbus, Georgia, appearing on behalf of the State of Georgia; and

THE HONORABLE RICHARD O. SMITH AND THE HONORABLE WALTER JOHNSON, Public Defenders, Columbus, Georgia, appearing on behalf of the defendant.

REPORTED BY:

SHARI McMILLAN
Official Court Reporter
P.O. Box 85
Columbus, Georgia

## P R O C E E D I N G S

THE COURT: All right. The Court calls the case of The State of Georgia versus William Henry Hance, Indictment Number 39654, charges of murder, criminal attempt, theft by extortion. A series of motions have been filed on behalf of the defendant who is here represented by The Honorable Richard O. Smith and Walter Johnson. Appearing on behalf of The State is the Honorable William J. Smith, District Attorney.

The motions are as follows: Motion for complete recordation of all proceedings, motion for individual voir dire and sequestration of jurors during voir dire, motion to prohibit jury dispersal, motion to compel disclosure, motion to allow defendant to participate at trial as co-counsel, motion for change of venue.

Are you ready for the movant, Mr. Smith?

MR. RICHARD SMITH: I am, Your Honor.

THE COURT: Mr. Smith for The State?

Mr. WILLIAM SMITH: I am ready, Your Honor.

THE COURT: All right.

MR. RICHARD SMITH: Your Honor, I would like the record to show William Henry Hance is in attendance this morning at this hearing. The primary purpose of this hearing this morning is to go through some motions

which have already been heard under Judge Land, but since the case has been reassigned to The Court, I would like to enter them into the record. I think Mr. William Smith and I are in agreement, if The Court is also in agreement. The first motion is the motion for complete recordation of all proceedings. Mr. Smith, do you have any objections?

MR. WILLIAM SMITH: No, I have no objections to that, Your Honor.

THE COURT: All right. This is a motion for an order directing the court reporter to take and record all hearings on motions, et cetera which is stated clearly in the motion, if there is no objections to the motion, than it is granted.

MR. RICHARD SMITH: The second motion is the motion for individual voir dire and sequestration of the jurors during the voir dire. This is your standard motion in a death penalty case. Any objections?

MR. WILLIAM SMITH: We have no objections to that, Your Honor.

THE COURT: All right, it is granted without objections.

MR. RICHARD SMITH: The next motion is the motion to prohibit jury dispersal during the trial from the time they are sworn in to the completion of the

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proceedings. Any objections to that?

MR. WILLIAM SMITH: None.

THE COURT: Likewise granted without objection.

MR. RICHARD SMITH: The next motion is the motion to compel disclosure. I will state that The State to the best of my knowledge has complied with this request on it's own, but we would request that the motion be granted.

MR. WILLIAM SMITH: Your Honor, If I may, we have done that and we will continue to. If new evidence should come to light between now and the time of trial. However, we would ask the Court not to enter an order granting that motion. No such motion or requirement is provided for or exempt under the Georgia law. If nothing else, we don't want to set a precedent.

MR. RICHARD SMITH: Your Honor, this is the basic Brady Motion, called for in the Brady decision.

MR. WILLIAM SMITH: If it is a Brady Motion as such, then we don't object, but just to open files, we do. Of course, anything in it that is exculpatory or mitigatin or in extenuation, certainly if The Court wishes us to, issue an order, the defense counsel will take an order to that effect. That's well and good.

THE COURT: All right, sir. If that should be raised by separate motion, we would take it up at that time. If there are any problems in securing that, which

you have asked for, but I agree with the District Attorney with respect to the motion that you have filed here. And the form which it is filed, I don't think the law does provide for discovery of this nature to be ordered by The Court.

MR. RICHARD SMITH: Can we ask for the granting of it within the confines of the Brady case?

MR. WILLIAM SMITH: I don't have any objections to that.

THE COURT: All right. Then I wish you would prepare an order to that effect and we will grant the motion and those terms.

MR. RICHARD SMITH: Next motion is a motion to allow the defendant to participate at his trial as co-counsel and I would like to preface this, Your Honor, if I might, with a couple of remarks. We have had our requests. Mr. Smith has sent Mr. Hance to the Central State Hospital in Milledgeville, Georgia, with the evaluation and examination and it is my understanding from the information we received from them that it was their feeling that he was competent to aid and assist us as co-counsel and as a defendant in the case. We have also had Mr. Hance examined by Mr. Lewis Lieberman, who is a psychologist here in Columbus. Mr. Lieberman suggested that there may be some character disorder



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that might be further examined to determine Mr. Hance's present mental status. However, he talked with Mr. Hance and he has requested that no further psychiatric examination be made or taken. He feels this to be a rational request and in view of what Mr. Lieberman has said and what they also said has been done at Central State Hospital, it seems like he is competent to make this request or he has requested that he be allowed to participate as we counsel in this case and to handle the primary body of the proceedings. Is that correct, Mr. Hance?

MR. HANCE: Yes.

MR. RICHARD SMITH: So we ask The Court to grant that motion. We have marked co-counsel out and said that he be allowed to participate as lead counsel.

THE COURT: Do you have any objection to Mr. Smith participating as co-counsel?

MR. HANCE: No, sir, I do not.

THE COURT: Does The State wish to be heard?

MR. WILLIAM SMITH: Yes. I would ask that The Court, for the purposes of this, there is no question that a man can represent himself. Of course, as The Court knows, they have that right, but I would ask that in light of this, of course, any case is

important, where one's liberty might be at stake, but in light of this case, if The Court would direct [illegible] inquiries for the purpose of the record to advise him of his right to have counsel, and assure the Court that he does wish this, realizing the potential consequences and all. I ask The Court, at least, ask Mr. Richard Smith to sit with him throughout the course of the trial and be available to advise him.

THE COURT: Mr. Hance, have you ever witnessed a trial in progress before, trial of a criminal case?

MR. HANCE: Yes.

THE COURT: Are you aware that this is what is termed a capital case in which the maximum penalty might call for execution?

MR. HANCE: Right, sir.

THE COURT: Do you feel that you are competent to handle this case from a physical standpoint, emotional, mental standpoint?

MR. HANCE: Right, sir.

THE COURT: You understand that The Court will see to it that your rights are protected in the case, of course, but one of the rights being that you are entitled to be represented by counsel. At this point you are represented by counsel. You also have the right to

represent yourself, do you understand these?

MR. HANCE: Right, sir.

THE COURT: And you are willing to allow Mr. Smith, then, to consult with you, participate in the trial according to your instructions and your directions?

MR. HANCE: Right, sir.

THE COURT: Would you like to state anything further to me in that connection?

MR. HANCE: Yes, Your Honor. It is going to be hard to believe, Your Honor, but that confession, I am going to have to prove this and I will attempt to, but that confession is not mine. Because it says one thing that I don't do. I can't see anything really questioning to a crime, at least a capital crime of murder and besides that, I am also, well, got charged with two other crimes at Fort Benning and those are the same as this one, confession, and each confession has the same meaning to kill and I don't understand. Of course, my name is on it, but I didn't want to sign it. Like I said before, I am going to have to prove it, and I will attempt to.

MR. WILLIAMS: Your Honor, If I may, on the issue of his, of course, this is a problem we are going to have if he represents himself, but the only issue now is whether or not he wishes to represent himself and waives counsel, and I ask that he be confined to that.

THE COURT: All right, sir. For the purposes

Mr. Hance, let me ask you: Have you had any legal training of this type yourself?

MR. HANCE: Just, I just watched, Your Honor.

THE COURT: You have never participated as an attorney?

MR. HANCE: No, sir.

THE COURT: But do you realize that the trial of the case is subject to any number of rules having to do with the admissability of evidance, the procedural rules as to who gets to proceed when and in what fashion and that the Court must make the determination of how the rules are to be followed?

MR. HANCE: Right, sir.

THE COURT: Do you feel that you are so well versed in these proceedings and rules and the substance of the law that you can give yourself adequate representation in your own case?

MR. HANCE: Also with my attorney here for the rules. So that will keep me from breaking any laws while I am in here.

THE COURT: You realize that when The Court rules upon any objections or motions that for the time being that will be a final ruling and will not go back into it and try to rehash it. Do you understand that?

MR. HANCE: Right, sir.

THE COURT: And where The Court gives you directions to how you will proceed, that is the way it is going to be without any more argument about it.

MR. HANCE: Right, sir.

THE COURT: And that you will be subject to being held in contempt of Court, if you do not abide by these rules?

MR. HANCE: I understand.

THE COURT: And if at any time your conduct becomes such as not to allow the trial to proceed in an orderly and lawful fashion, then you would not be allowed to act as your own counsel?

MR. HANCE: Sir, I understand, but as long as it is legal, then the District Attorney should not object to it, right?

THE COURT: That's correct. He will not be permitted to make any unsubstantiated motions or objections at all. Arguments will be heard upon any objections made by any side and the ruling will be made by The Court. My main concern is to see that you are given a fair trial and that The State be also given a fair trial and that it proceed in an orderly fashion according to law and that there will not be any

disruption because of your lack of experience or any other reason and at any such time that it appears that the trial is in danger of becoming just a discussion of the issues then The Court is going to intervene and see to it that co-counsel instructs you as to how you should proceed.

MR. HANCE: Right.

THE COURT: Now I want that understood at this time. And any time you wish to redesignate Mr. Smith or anybody else as lead counsel in the case, you are free to do so.

MR. HANCE: Right, sir.

THE COURT: For this purpose, then, I will grant his motion under these instructions, but I will ask Mr. Smith to advise with him fully as to his manner of presenting whatever he wishes to present in the case. I do want him to understand that the burden is on the State to prove the guilt in this case as in any criminal case beyond a reasonable doubt. You don't have any burden to prove yourself innocent.

MR. HANCE: I see. I didn't kill that woman.

MR. WILLIAM SMITH: If Your Honor, please, if I may?

THE COURT: We don't need to go into that. I just want you to know where the burden lies in the case.

So you will be afforded the right to face those who accuse you and put them through a thorough and sifting examination and listen to the testimony that they give. You have the right to subpoena witnesses yourself if you wish to and if what they have to say is pertinent, germaine to the issues then they will be heard.

MR. HANCE: Your Honor, I have a question, sir?

THE COURT: With respect to this motion? Go ahead.

MR. HANCE: If that confession is proved not to be mine, will I be acquitted?

THE COURT: The Court is not at liberty to go into that issue at this time. I will ask you to con[illegible] with counsel. You have able counsel, experienced and able and this is an issue that you should take up with him.

MR. HANCE: My apology to the Court.

MR. RICHARD SMITH: Your Honor, may I also state for the record that Mr. Hance is doing this against my advice, but he informs me that he has certain items of information and tactics and he doesn't want to discuss it with anyone else, including myself.

THE COURT: That's entirely for him to decide and I understand the position you are in. I will just ask that you see that he is afforded a fair trial and

of course, it is The Court's intention to see he gets it, but if it takes the assistance of you, we will hear from you at any time.

MR. RICHARD SMITH: Your Honor, the final motion was for a change of venue. This motion was made at the time this originally happened and we found Columbus was in somewhat of an uproar in regards to the stocking stranglings and that situation. That seems to have been subsided as of this moment and Mr. Hance has advised me that he wishes to withdraw the motion for change of venue and not have the motion considered by The Court.

THE COURT: Mr. Hance, is that correct? You do not wish to have the case tried in another jurisdiction?

MR. HANCE: (Witness shakes head.)

THE COURT: All right, I think that concludes the hearing then. That motion then has been withdrawn and the other motions, rulings, have already been made.

MR. RICHARD SMITH: Thank you, sir.

(HEARING CONCLUDED.)

CERTIFICATE OF REPORTER

MUSCOGEE COUNTY )
)
GEORGIA )

I, Shari B. McMillan, Official Court Reporter for the Chattahoochee Judicial Circuit of Georgia, do hereby certify that the hearing of The State of Georgia versus William Henry Nance was heard on November 27, 1978, that I was authorized to and did report on a shorthand machine the proceedings in said hearing, and that the foregoing pages 2 to 13 inclusive, constitute a true and correct transcription of my shorthand report of the testimony and documentary evidence adduced in said cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 21st day of July, 1979.

Shari McMillan
Certified Court Reporter B-490
Chattahoochee Judicial
Circuit of Georgia

GEORGIA, MUSCOGEE COUNTY;
CLERK'S OFFICE, SUPERIOR COURT
FILED IN OFFICE
JUL 25 1979
Mike Miller
DEPUTY
CLERK SUPERIOR COURT

GEORGIA, MUSCOGEE COUNTY:

CLERK'S OFFICE SUPERIOR COURT:

I, James L. Stubbs, Clerk of the Superior Court of Muscogee County, Georgia, do hereby certify that the foregoing is the original copy of the reporter's transcript of a pre-trial hearing filed in this office.

Witness my signature and the seal of said court hereto affixed, this ____ day of January, 1980.

.....

Clerk, Superior Court
Muscogee County, Georgia

CHARGE OF THE COURT

It is the duty of the Court to instruct you as to the law which you must apply to the facts of the case, after you determine what the facts are. It is important that you listen closely to these principles of law which I shall instruct you in, so your verdict will be one that is based upon the facts and the law, otherwise it would not be a lawful verdict, and all that we've been doing since Monday would be for naught. So please give me your close attention, and if you need to have any of this repeated to you or recharged, you will have the opportunity to ask the Court to do so, it depends upon whether the Court feels it is necessary. So, I am going to ask you to give your undivided attention to me during this portion of the trial.

The defendant on trial is named William Henry Hance in this Bill of Indictment, in which the State of Georgia has charged him with the commission of two offenses, we'll refer to them by their names; in Count One, Murder; Count Two, Criminal Attempt Theft by Extortion.

The Grand Jurors selected, chosen and sworn for the County of Muscogee, State of Georgia, in the August Term, Nineteen Hundred and Seventy-eight, and on the 15th day of August of that year returned into this Court the following indictment, I will omit the formal parts, but the allegation

reads as follows, that: "These Grand Jurors, in the name and behalf of the citizens of Georgia, do charge and accuse William Henry Hance in Count One with the Offense of Murder." Hance is referred to as the Accused. "For that said Accused, in the County of Muscogee, in the State of Georgia did on the 28th day of February, 1978, unlawfully, with malice aforethought, kill and murder one, Brenda Gail Faison, alias Gail Jackson, alias Gail Bogen, by then and there hitting and beating her with a blunt instrument, a further name and description being unknown to the Grand Jurors, contrary to the laws of said State, the good order, peace and dignity thereof."

And In Count Two, "And the Grand Jurors aforesaid, on their oath aforesaid, in the name and behalf of the citizens of Georgia, charge and accuse William Henry Hance with the Offense of Criminal Attempt Theft by Extortion, for that said Accused, in the County of Muscogee, in the State of Georgia, did on the 8th day of March, Nineteen Hundred and Seventy-eight, unlawfully attempt to obtain ten thousand dollars from Curtis E. McClung, Chief of Police, Columbus, Georgia, by threatening to kill, execute and murder Gail Jackson, said act of Accused in writing and depositing in the United States Mail a letter addressed to the Columbus Police Department, in care of Chief of Police, Columbus, Georgia, threatening to execute Gail Jackson unless ten thousand dollars was paid by June 1, 1978, being a substantial

step toward the commission of a felony, to wit: Theft by Extortion, contrary to the laws of said State, the good order, peace and dignity thereof."

These are the allegations, ladies and gentlemen, of the Bill of Indictment. These allegations constitute no proof of any matter, nor does the indictment itself constitute proof of any matter, except that it was returned into this Court by said Grand Jury on that date I previously read to you.

I caution you, ladies and gentlemen of the jury, than an indictment does not constitute evidence nor does the fact that the Grand Jury has returned the indictment against the defendant constitute any evidence or inference of guilt, it is merely the manner in which the charge is brought before the Court for trial on its merits as revealed in your presence and hearing.

To this indictment the defendant has appeared and entered his plea of not guilty. The defendant's plea of not guilty is no evidence of his innocence. The allegations of the Bill of Indictment, together with the defendant's plea of not guilty thereof constitute, formulate and establish the issues upon which you're called to try, and by your verdict to determine namely whether the defendant is guilty or innocent of the crimes of murder and criminal attempt theft by extortion as charged in that indictment.

It now becomes the duty of the Court to instruct you as to the principles of law applicable to this case. You will take these principles as given in charge by the Court and apply them to the facts of the case as you ascertain the facts of the case to be from the proceedings had before you, and in that way make up your verdict in the case.

The word verdict relates to truth and has reference to the truth of the case as ascertained by you in your verdict. Under our system it is the duty and responsibility of the Judge to ascertain what the law is and what is applicable to the case, and to instruct you of what the law consists.

It is your duty to ascertain the truth of the case from a factual standpoint from the evidence presented to you. Then it is your duty and responsibility to apply the law to the facts and by this application of law to the facts, and of facts to law to arrive at a verdict in the case.

The defendant, as I say, has entered his plea of not guilty to the indictment, whereby he denies the charges made therein and thus the burden of proof is placed upon the State to prove each essential element of the charge made in the indictment, or the charges made in the indictment, beyond a reasonable doubt.

A reasonable doubt, ladies and gentlemen, is one based upon some ground in the testimony, or the want of testimony, or upon the evidence in any other manner, including

the testimony given by the defendant himself. It is a doubt which is reasonably and fairly entertained as opposed to a vague and fanciful doubt. A reasonable doubt is such a doubt as would remain in the minds of fair minded jurors who are honestly seeking for the truth, after having listened to all of the testimony and considered all of the evidence in the case.

The defendant enters upon the trial of the case with a presumption of innocence in his favor, and this presumption remains with him throughout the trial until and unless the State produces in your presence and hearing evidence of sufficient weight and character to convince your minds beyond a reasonable doubt of the guilt of the Accused. So long as this doubt remains in your mind it is your duty to give the defendant the benefit of that doubt and to acquit him. But, if the doubt no longer exists then you are authorized to convict him.

I charge you, ladies and gentlemen, you are made by law the sole and exclusive judges as to the credibility of witnesses and the weight you shall give their testimony. That applies to all of the witnesses in the case. And in determining their credibility, you may consider all the facts and circumstances of the case. You may consider the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testify. You may consider the nature of the facts to which they testify,

the probability or improbability of their testimony. You may consider their personal credibility so far as that may legitimately appear to you from the trial of the case.

I further charge you, ladies and gentlemen, that the law directs that it is your duty where it can be done to so reconcile conflicting evidence, if there be such in the case, as to make all the witnesses speak the truth, so that perjury will be imputed to none of them. But, if there be evidence in the case of such irreconcilable conflict that this cannot be done, you will accept that evidence which is most reasonable and credible to you. As I stated a moment ago, you are made by law the exclusive judge of the credibility of witnesses and the weight you shall give their testimony.

You have heard the term used in the trial to impeach a witness, or the impeachment of testimony. To impeach a witness is to establish that he is unworthy of belief. When the believability of a witness is attacked, the jurors then must decide the truthfulness of the witness' testimony. When witnesses appear and testify they are presumed to speak the truth and are to be believed by the jury unless it is established that they are unworthy of belief in some manner provided by law or otherwise contradicted in your judgment. That a witness is unworthy of belief and his testimony thus discredited may be established by several methods, one of which is by disproving the facts testified to by him or her. Another is by proof of

contradictory statements previously made by him or her on matters relevant to his or her testimony in the case.

You are to weigh all the testimony and evidence supporting or discrediting a witness, and at last say whether you will believe or disbelieve the testimony of the witness attacked. It is the exclusive function of the jury under all circumstances of the case to determine whether a witness' testimony is or is not believable. However, if you determine in your minds absolutely that a witness' testimony is impeached and thus discredited, then it is your duty to disregard such testimony, unless such testimony is corroborated, in which case you may believe the witness. It is always a matter for you to determine whether or not a witness has in fact been discredited.

Now, what is evidence? Evidence is all the testimony received from the witnesses, the exhibits which are admitted during the trial, any facts which may be agreed to by counsel. It does not include the indictment, as I've already told you, or the opening statements, or the closing arguments, of course, nor the charge of the Court is not evidence.

Now, evidence may be either direct or circumstantial. Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testified, and it includes exhibits which are admitted into evidence during the trial, it's that evidence which points directly and immediately to the question at issue.

Evidence may also be used to prove a fact by inference. This is referred to as circumstantial evidence. Circumstantial evidence is the proof of fact or circumstances by direct evidence from which you may infer other related or connected facts which are reasonable and justified in the light of your experience. Circumstantial evidence alone will not justify a finding of guilty unless the circumstances are entirely consistent with the defendant's guilt, wholly inconsistent with any reasonable theory of the defendant's innocence and are so convincing as to exclude a reasonable doubt of the defendant's guilt. If one or more of the circumstances relied upon by the State are not so clearly proven, and for that reason you reject one or more of the circumstances so relied upon, then you would inquire whether the remaining circumstances you believe are so clearly proven or consistent with the defendant's guilt, and inconsistent with any other reasonable hypothesis save that of his guilt.

Now, during the course of the trial the Court has on occasion ruled out certain testimony as inadmissible. It has stricken certain testimony from the record on the ground that it was not admissible as competent evidence, and I charge you in that regard that any such testimony which I have ruled out or stricken from the record, is not evidence in the case, and you cannot consider it during your deliberations in reaching your verdict. You must not speculate as to why the Court

sustained the objection to any questions or what the answers to such questions might have been. You must not draw any inference or speculate on the truth of any suggestion included in such a question which was not answered.

Now, ladies and gentlemen, this defendant is on trial for the particular offenses as charged in this Bill of Indictment that you will have out for your consideration, and on no other charge or charges. The defendant, William Henry Hance, is not on trial on account of any other alleged offense or offenses, and any evidence in this case with reference to any other alleged offense or offenses, if any, is admitted for the purpose of your consideration solely and only under the provisions of the law that where knowledge, motive, intent, good or bad faith, or identity, or any other matter dependent upon a person's state of mind are involved as material elements in the offense or offenses for which he is on trial. The evidence of the defendant's conduct with reference to the same or similar transactions about the same time is admissible for consideration of the jury insofar only as it might tend to illustrate the defendant's state of mind on the subject involved, if you think it does so illustrate it.

The Court does not intimate or express to you any opinion whatsoever as to whether the defendant has had any other transactions at any time similar to the charge for which he is being tried in this Bill of Indictment, or of his guilt

or innocence of the charge contained in this indictment. Whether he has or has not committed other or similar offenses as I've explained to you, is a matter for you to determine. But, if you believe that the defendant has had similar transactions, you will bear in mind in connection with such evidence that you are considering it solely with reference to the mental state or intent of the defendant insofar as the same is applicable, or refers to, or illustrates the charges embraced in this Bill of Indictment which you will have out with you for your consideration and for no other purposes.

Now, an alleged confession or confessions by the defendant were testifed to during the course of this trial. Before you may consider these as evidence for any purpose you must first decide two questions; first, was the defendant warned of his constitutional rights, and did he clearly understand and knowingly give up such rights; and second, was his confession clearly and voluntarily, clearly voluntary and freely and willingly given. I'll repeat that second portion. Was his statement or confession clearly voluntary, and freely and willingly given.

The rights which must be explained and which must be understood and given up by the defendant before any confession is taken by police are as follows: (1) That he had a right to remain silent; (2) That if he chose not to remain silent anything that he said, which would include anything

he wrote or signed, could be used as evidence against him in court; (3) that he had a right to consult a lawyer before any questioning, and to have that lawyer present with him at all times during any questioning; (4) that if he did not have money for a lawyer, a lawyer would be provided for him by the State to represent him before any questioning and to be present with him during any questioning. Further, that he would have the right to stop any interrogation and to be provided counsel even though he previously had waived his right, should he desire to request counsel after interrogation had already begun.

Now, with respect to voluntariness. To be voluntary a confession must be freely and willingly given with complete understanding, and without any threats or use of violence, or fear, or injury, or any suggestions, or promises of leniency or reward. A statement induced by the slightest hope of benefit, or the remotest fear of injury is not voluntary. To be voluntary a statement or a confession must be the product of a free will and not under compulsion or any necessity imposed by others.

The burden of proof is on the State to establish that the warning of all the rights mentioned were given, that they were clearly understood, and knowingly given up by the defendant, and that the statement or confession was voluntary and was freely and willingly made.

If you find that all the warnings as to his constitutional rights were given, that the defendant did clearly understand the meaning of what was said and knowingly gave up such rights, and if you further find that any confession was voluntary, then you would consider it as evidence, and you will apply the general rules for testing the believability of witnesses, and decide what weight, if any, you give to all or any part of such evidence. However, if you fail to find any one of the conditions that I have just described, you must disregard the confession entirely and give it no consideration in reaching your verdict.

I charge you that you should consider with great caution the evidence of any admission or incriminatory statement made by the defendant. In weighing such evidence you should consider whether the confession was made by the defendant, whether it was truthful, whether it was accurately repeated, or reported, whether the defendant understood what was said. Consider the circumstances under which it was made, the emotions of hope or fear that may have existed. You may believe this type of statement in whole or in part, believing that which you find to be true and rejecting that which you find to be untrue. Upon you alone rests the duty to apply the general rules for testing the believability of witnesses, and decide what weight should be given to all or any part of the statement.

Certain witnesses have been introduced for your consideration in the trial of this case who are in law termed expert witnesses. In that connection I charge you that the law permits witnesses who have had special training, knowledge and experience in certain lines to give their opinions as experts based upon their knowledge of particular matters. The weight which is to be given the opinion of experts is a matter for you to decide. You may accept it and act on it, or you may reject it, and then act on your own judgment as you may apply it to the evidence in the case. The testimony of an expert, like that of any other witnesses, should be received by you and given such weight and credit as you think it is properly entitled to.

Ladies and gentlemen, I further charge you that regardless of whether or not the defendant has any other defense, and regardless of whether or not there is any other evidence in the record upon which a reasonable doubt as to his guilt could be based, proof of good character may of itself constitute such a defense in his behalf, and you, the jurors in this case overriding any amount of positive evidence pointing to the guilt of the defendant, may if you see fit, acquit the defendant upon the reasonable doubt and proof of good character generated in your minds, and in that event the form of your verdict would be, "We, the jury, find the defendant not guilty."

Identity is a question of fact for the determination

of the jury. It is dependent upon the credibility of the witness or the witnesses offered for this purpose, whether dependent upon physical attributes such as voice, dress, height or weight, or some intangible factor not capable of description. You have the right to take into consideration all of the factors previously charged you in regard to the credibility of witnesses. It's for you to say whether under the evidence in this case the testimony of witnesses and the facts and circumstances sufficiently identify this defendant as the perpetrator of this crime or these crimes beyond a reasonable doubt. It's not necessary that the defendant prove that another person committed the offense, it is sufficient if there are facts and circumstances in this case which would raise a reasonable doubt as to whether this defendant is in fact the person who committed the crime. Identification by a witness of a person or a thing is necessarily a matter of opinion, and when accompanied with the facts upon which it is founded it is always admissible.

If you should find that fingerprints corresponding to those of the defendant were found in a place indicating where a crime was alleged to have been committed, this would be circumstantial evidence, it's weight and value being a question for you, the jury, to determine. To warrant a conviction on the fingerprint testimony alone, the circumstances must be such that the fingerprints could only be impressed

at the time when the crime was committed. I'm referring now to Count Two of the Indictment.

Now, there are certain general definitions in the Georgia law which I must give to you and I want you to consider. A crime is defined in Georgia as a violation of a Statute of this State in which there shall be a union or a joint operation of act and intention or criminal negligence.

I'm going to give you certain presumptions of law which are applicable in this case. A presumption is a conclusion that the law draws from given facts. Now, each of these presumptions is rebuttable, that is, they are subject to being overcome by evidence to the contrary. Now, these are as follows: Every person is presumed to be of sound mind and discretion. This presumption may be rebutted. The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. But these presumptions may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts, and that's you, the jury, may find such intention upon consideration of the words, the conduct, the demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

A specific intent to commit the crimes charged in this indictment, each count thereof, is an essential element

that the State must prove beyond a reasonable doubt. Intent is always a question for the jury and it's ordinarily ascertained by conduct. Intent may be shown in many ways provided you find that it existed from the evidence produced before you. It may be inferred from the proven circumstances or by acts and conduct, or it may be presumed when it is the natural and necessary consequence of the act.

Now, as to the specific offenses charged in this Bill of Indictment, I charge you that in the Code of Georgia, Criminal Code is Title 26, Chapter 11, has to do with criminal homicide, and more particularly 26, Section 26-1101 entitled Murder, reads as follows: "(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. A person convicted of murder shall be punished by death or by imprisonment for life."

But, you are not concerned with any question of punishment at this point, the sole issue before you in this portion of this trial is to determine the guilt or the innocence of the defendant as to these two charges. Before

you would be authorized to find the defendant guilty of the offense of murder you must find and believe beyond a reasonable doubt that the defendant did, with malice aforethought, either express or implied, cause the death of the person named in the indictment.

I charge you that if you find and believe that at any time prior to the date this indictment was returned into this Court that the defendant did, in the County of Muscogee, State of Georgia, with malice aforethought, kill and murder the person named in the indictment, Brenda Gail Faison, and the two aliases, in the way and manner set forth in this indictment, then you would be authorized to find the defendant guilty of murder.

The other offense which is charged in this indictment is known as criminal attempt theft by extortion. First I will define for you what theft by extortion is under the Georgia law. In the same Title, but in Chapter 18, we find Section 1804, it reads in part as follows: "A person commits theft by extortion when he unlawfully obtains property of, or from another person, by threatening to inflict bodily injury upon anyone or commit any other criminal offense. In a prosecution under this Section, the crime shall be considered as having been commited in the County in which the threat was made or received, or in the County in which the property was lawfully obtained, if it related to any property."

And we need not go into the punishment of that particular offense.

Now, I want you to understand that the defendant is not charged with the offense of theft by extortion, but charged with the crime of criminal attempt to extort by theft. And in that regard I charge you that a person commits criminal attempt when with intent to commit a specific crime he performs any act which constitutes a substantial step toward the commission of that crime. So you understand that this defendant is being charged with the intent to commit this theft by extortion under the provisions of the criminal attempt section of the Code. If you believe that any time within four years next preceding the date that this Bill of Indictment was filed that he did commit that offense which is in Count Two of the Indictment, you would be authorized to find the defendant guilty of that crime if you believe that beyond a reasonable doubt.

All right, in conclusion I charge you that the burden in the case rests upon the State to prove beyond a reasonable doubt that the defendant is guilty of these offenses with which he is charged, and I've given you the definition of reasonable doubt and I think a complete charge as to the other aspects. I do want to state to you that anything that the Court has done or said in the trial of the case was not intended to intimate, or to hint, or to suggest to you

what your verdict ought to be in this matter because this is entirely for you jurors to determine upon your consideration of the case.

The twelve of you who have been sworn must reach a unanimous verdict with respect to any issue which is an element of either or both of these offenses. It must be a unanimous verdict and agreed upon by the twelve jurors. I'll give you further instructions as to the alternate jurors momentarily.

The only interest that the Court has in the matter is to see that the case be fairly presented according to law, and that you as honest and conscientious and impartial jurors consider the case as the Court has instructed, and return verdicts that speak the truth as you find the truth of the case to be. By no ruling which the Court has made during the progress of the trial has the Court expressed any opinion upon the facts in the case or upon the credibility of the witnesses or upon the weight of the evidence, or upon the guilt or innocence of this defendant. By no portion of this charge have I intimated or expressed any opinion on any of these matters because these belong exclusively to you for your judgment and determination. The Court states the law, you find the facts, you apply the one to the other, as I've already told you, and that way decide the case.

The charge of the Court should be received and

considered by you in its entirety, as a whole, as one body of law applicable to this case. Such repetition as does occur or did occur during the progress of this charge did not take place for the purpose of emphasizing the principle or principles of law repeated over other principles, but such repetition as did occur took place simply in order to enable the Court to expound the law to you better as the charge progressed in your presence. You are the sole judges of the facts of the case. You are the sole judges of the credibility of the witnesses. You are the sole judges of the weight of the evidence, and of the guilt or innocence of the prisoner at the bar.

The State contends the defendant is guilty of each of these charges contained in the indictment. The defendant denies he is guilty. This is the issue upon which you are to pass. Look to all the facts and circumstances of the case, to all of the evidence introduced, the testimony of the witnesses, the physical evidence, the demonstrative evidence, the documentary evidence, all evidence which will be out with you, and you determine where the truth lies. If you believe beyond a reasonable doubt that the defendant is guilty of the charge of murder, then you would be authorized to find the defendant guilty, and the form of your verdict would be, "We, the jury, find the defendant guilty," and you will designate the offense of murder.

If you do not believe beyond a reasonable doubt that the defendant is guilty of the charge of murder, then it would be your duty to acquit him, and in that event the form of your verdict would be, "We, the jury, find the defendant not guilty of the offense of murder."

Likewise, with respect to the charge of criminal attempt theft by extortion, if you believe beyond a reasonable doubt that the defendant is guilty of that charge, you would be authorized to find him guilty, and the form of your verdict would be, "We, the jury, find the defendant guilty of the offense of criminal attempt theft by extortion."

Conversely, if you do not believe beyond a reasonable doubt that the defendant is guilty of that charge, it would be your duty to acquit him, and the form of your verdict would be, "We, the jury, find the defendant not guilty of the offense of criminal attempt theft by extortion."

Upon retiring to the jury room, you should first select one of your number to act as foreman or forelady, or foreperson if you prefer, and that person will preside over your deliberation and will sign the verdict in which all twelve of you will freely and voluntarily agree.

Your initial conduct upon entering the jury room is a matter of importance. You've been together all week, and I'm sure you've gotten to know each other pretty well, but I caution you it's not wise immediately to express a

determination to insist upon a certain verdict. If your sense of pride is aroused you may hesitate to change your position even if you decide you're wrong. So, consult with one another and consider each other's views. Each of you must decide this case for yourself, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it's wrong. However, you should never surrender honest convictions or opinions in order to be congenial and in order to reach a verdict solely upon the opinions of other jurors.

When you have made your verdicts in these cases, you will notice on the back of the indictment there is a place for a verdict to be written. I'm going to alter it to some extent like the first form of verdict, if you choose to use this, it's there for your convenience, it shows, "We, the jury, find the defendant blank," and you'll fill in the words guilty or not guilty, and I'll ask you to fill in the name of the charge. And there's a place also for blanks to be filled in showing the date, and a place for the foreman to sign, I'm going to alter the second part which is, "We, the jury, fix the sentence as follows," this is an old form, and I want to make that much like the first form I just read to you, but I'm going to wait and do that after I excuse you to begin your deliberations, and take it up with counsel so we can make sure that there's no objection to the form which

goes out with you all. But, in any event, when you have reached your verdict, have your foreman write it in in each event in the form in which I have instructed you, and it will be dated also today's date, if it is today's date, will be the 15th day of December, 1978, and there will be a line provided for the foreman to sign the verdict.

When you have completed filling in those unanimous verdicts, then knock on your door to signal to the bailiff that you have in fact reached your verdicts in the case, he'll summon us all back in here and we will await the reception of your verdict.

Now, with respect to you two alternate jurors, I believe it's Ms. Pate and Mr. Ness. You are instructed that you must be sequestered under the care of a bailiff also as will be the jurors who are passing on the case. So, don't discuss the case with anyone or between yourselves, or the bailiff who is assigned to your care. Should any juror now considering the case become ill or otherwise unable to continue you would then be responsible for joining the case instead of the juror who had become disqualified. In the meantime you must be sequestered pending the return of a verdict by the jury, or otherwise directed by the Court.

So, I'm going to ask that you all take charge of these two alternate jurors and take them to some separate place, they don't necessarily need to be kept in the other

jury room, but someplace where they will not be around anyone else, and we'll discuss where to do that as soon as I dismiss the first twelve. So, you'll make no communication with them yourself or permit anyone to communicate with them, you understand as you were sworn to do previously.

Let me ask the first twelve jurors now then to retire to the jury room where you've been going. Select your foreman, and when we deliver all of this evidence to you and a copy of the indictment, then you may begin your deliberations. If you have any questions send me word through the bailiff.

(The jury retires to begin deliberations at 6:23 o'clock p.m.)

THE COURT: Lt. Freeman, we have two alternate jurors who need to be sequestered also with a bailiff, is there any place better than another for me to direct them?

LT. FREEMAN: We can take them down to our office.

THE COURT: All right, I don't want any deputies discussing with them or anything else.

MR. W. SMITH: Your Honor, I'm sorry, I was listening to one of the bailiffs, he was giving me some information about one of my employees. What did you say?

THE COURT: We're sequestering the two alternates as I just instructed they would be, and I was just asking the lieutenant here if there was a place that might be

a little bit better than one of the other jury rooms to take them where he can keep them separate and apart, and he suggested that he take them to the sheriff's office.

Well, as long as you're sure there will be no conversation that will reach their ears.

Would you all please follow Lt. Freeman down to his office, you've heard the instructions I've given you.

(The two alternate jurors leave the courtroom at this time.)

MR. R. SMITH: Your Honor, it's my understanding that the Court was going to charge on the subject of venue, is that a misunderstanding on my part?

THE COURT: I believe it was included in the portion of the charge I gave which had to do with County, one, if we may call it that, where I said, "I charge you that if you find and believe any time prior to the date this indictment was returned into this Court that the defendant did in the County of Muscogee, State of Georgia, with malice aforethought kill and murder," et cetera.

I did not mean to mislead you if I said I was going to give a special charge on venue, but, of course, I charged them that every essential element must be proved.

MR. R. SMITH: Yes, sir, I understood there would be a separate charge on venue itself.

THE COURT: Do you have any exceptions you would like to list to the charge on behalf of the defense?

MR. R. SMITH: Your Honor, the only exception I would have would be on the charge of venue which I did understand would be a separate charge, and for that reason did not file a specific charge or request for charge on that part.

THE COURT: Does the State think the jury ought to be reassembled for a more specific charge as to venue? It's my feeling that this should cover it.

MR. W. SMITH: I concur, Your Honor.

MR. W. SMITH: Your Honor, our feeling was since we specifically raised the question in those terms that it being of venue, that mention of the word venue was more significant and a point than just saying it must happen in the County of Muscogee.

THE COURT: Well, that's just what venue means.

MR. W. SMITH: I don't believe the jury would know what venue means necessarily.

THE COURT: I think they would have a better understanding if I told them it must be proved that it took place in Muscogee County, Georgia than I would if I tried to explain to them what venue means.

I'm going to note your objection, and it is on the record. I'm going to let the charge stand in that respect

DIRECT EXAMINATION

BY MR. RICHARD SMITH:

Q Mr. Hance, where are you from?

A Lexington, Virginia.

Q And can you tell us about your family?

A I came from a relatively poor family, kind of strictly poverty, but they're a beautiful family.

Q Do you have brothers and sisters?

A One sister.

Q One sister, and where is she?

A Newport News, Virginia.

Q When is the last time you saw her?

A Two years ago.

Q Have you heard from her recently?

A About three weeks ago.

Q What about your father?

A About the same time.

Q Where is he?

A Lexington.

Q Lexington; has he been to see you?

A No, he's been feeling rather poorly lately.

Q How about your mother?

A No, she died about six years ago.

Q Six years, and what age were you then when she died?

A Close to twenty-one.

Q Where were you at that time?

A California.

Q What were you doing in California?

A Stationed in the Marine Corps then.

Q Were you with her when she died?

A No, she was at home.

Q How long had it been since you saw her before she died?

A About two years or so.

Q Why such a long time?

A Well, at that time, well, they couldn't really let people go home on leave, and I didn't really think that she was just that sick.

Q You say you were in the Marine Corps?

A Yeah.

Q But you're in the Army now?

A Yeah.

Q How did that come about?

A Well, I was married at the time I was in the Marine Corps, and my marriage was breaking up, so I got out of the Marine Corps and came in the Army because most of the time I was in the Marine Corps I was out in the field. But, my marriage broke up anyway.

Q Do you have a child by that marriage?

A Yeah.

Q Where is that child?

A With her mother.

Q Is it one child?

A Yeah.

Q Boy or girl?

A Girl.

Q A little girl; when is the last time you saw her?

A About two years ago.

Q Two years ago; what is her age?

A Three.

Q Three years; you saw her when she was about a year old?

A Pardon me?

Q You saw her when she was about a year old?

A Right.

Q Why haven't you seen her since?

A Well, I was planning on seeing her this Christmas.

Q Where is she?

A Williamsburg, Virginia.

Q Williamsburg, Virginia; do you have any other children?

A I've got one here in Columbus.

Q And where is that child?

A With his mother.

Q When is the last time you saw that child?

A About two months after it was born.

Q Okay, and how old is that child now?

A It should be about nine or ten months old.

Q The child was just born right before you went into jail, is that right?

A Right.

Q Who is the mother of that child?

A Linda, Linda Davis.

Q Linda Davis that was in here yesterday?

A Right.

Q How do you feel about these children?

A I love them.

Q You mentioned something about being shipped overseas or something?

A Yeah, I was going overseas around July the first.

Q Around July the first; and this thing intervened and changed that?

A Right.

Q You told us just yesterday that you didn't kill these girls.

A I didn't.

MR. W. SMITH: Your Honor, I'm going to object to that. That issue has been decided, it's over and behind us, it cannot be in mitigation for punishment at this time.

MR. R. SMITH: Your Honor, I think his thoughts around

the subject are relevant.

MR. W. SMITH: He asked him to again state whether or not he had killed the girls. That cannot be relevant at this point.

THE COURT: I did not understand him to state whether or not, I understood him to begin-- I thought it was going to be a question, prefacing it with what he had said previously. I agree that the tenor of his examination should not permit any presentation of an issue of facts.

MR. R. SMITH: Your Honor, my position, of course, at this hearing is that the question of whether or not he killed the girls has been decided by the jury, and I'm not asking that question for purposes of trying to raise the question in the jurors' minds at this point. But, I think it's significant to get into his thoughts and thought processes on the question in terms of mitigation for the jury to understand what goes into his mind and what kind of person he is.

THE COURT: I'll have to hear what you're going to do before I can rule further.

MR. R. SMITH: My next question is, why he thinks that, why he says that.

MR. W. SMITH: Why he thinks, Your Honor, I disagree and I object to this line of questioning, this issue is over with. It's beyond, behind us, it's been

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disposed of, the jury made a finding on it beyond a reasonable doubt. And why he thinks he didn't kill them cannot be relevant evidence under the definition of mitigating circumstances that the Court has and the Court has given the jury, I submit.

MR. R. SMITH: Your Honor, we would disagree with that only if the Court is going to instruct the jury that they may not consider in aggravation the fact that he denied doing something they decided he did. And we think that the jury has a right to consider his emotions for denying this crime in mitigation.

THE COURT: I'll permit you to continue, but I want your questions directed to him toward establishing mitigation and not legal justification.

MR. R. SMITH: Yes, sir; well, what I'm trying to determine is why he came before the Court and denied this charge, not in terms of legal justification but in terms of sincere feelings.

THE COURT: Go ahead.

Q Do you in your own mind believe that you killed those girls?

A No.

Q Do you recall having killed those girls?

A No.

Q Were you speaking to us sincerely yesterday?

A That's correct.

Q Do you believe the testimony you gave yesterday was true?

A Yes.

MR. W. SMITH: Your Honor, if I may, this is absolutely nothing but a denial of his commission of the crime, again which has been disposed of, before the jury. He's saying that he swore to the truth when he said that he did not kill them. That is exactly what I objected to.

MR. R. SMITH: Your Honor, the question I asked him was whether or not he believed what he said was true and I think that is significant to the question in this particular instance of why he's come before the Court, and I am not presenting any evidence to the jury that he did not do it. I'm only trying to present evidence to the jury that if he comes before the jury saying he didn't do it, then he believed it, that he wasn't doing that, that he's trying to tell the jury something that he believed not to be true.

MR. W. SMITH: Your Honor, this is trying to imply some kind of mental issue in the trial which has not been raised by any competent evidence whatsoever during the course of the trial, not been in issue at this trial.

MR. R. SMITH: Your Honor, the defendant's state of

mind at the time of the trial and the time of the commission of the crime, all these things are to be considered in this stage of the trial.

THE COURT: I believe the District Attorney's point is well taken. I'll overrule, I'll sustain his objection and direct you not to follow along the line of questioning that you have just outlined.

MR. R. SMITH: All right.

Q Mr. Hance, do you have any feelings of remorse about the death of these girls?

A What do you mean by remorse?

Q Do you have any feelings about the death?

A Yeah.

Q Aside from talking about your involvement or lack of involvement, what feelings do you have?

A They were human just like everybody else.

Q Do you have feelings about human life?

A Yeah.

Q What feelings are they?

A Well, I believe everyone has a right to live.

Q Do you think you have the same right?

A Of course.

Q Why?

A I love everybody, I don't put in my head to do anything wrong, and if things do go wrong it's-- if things do go wrong with me or anything of that nature, it could be

corrected.

Q Do you have anything about this that you want to say?

A Well, everything I was saying yesterday was true, and like I said before, I know an officer's word goes good in a Court of Law, but I knew myself that I was telling the truth that I didn't really--

MR. W. SMITH: Objection, Your Honor.

Q Do you have anything you want to say about your position at this stage?

A Well, this really could wreck my life and my career, and that's what I really try to protect, so I try my very best to stay out of trouble.

MR. W. SMITH: Your Honor, I could not hear him, I'm sorry, maybe the court reporter could read back to me. I would like to know what he said, or maybe he can repeat it, but I could not hear that answer. I don't know if the jury could or not.

MR. R. SMITH: I can hear him.

THE COURT: Will you repeat your answer, I was unable to hear it, too.

MR. HANCE: I said, this could wreck my life and career, and that's why I try my best to stay out of trouble.

MR. W. SMITH: Thank you.

Q Anything else that you want to say?

A The jury made a decision, that was up to them, but I was trying my best to get my point across to them.

Q Anything else you want to say?

MR. R. SMITH: He's with you.

MR. W. SMITH: I don't have any questions.

MR. R. SMITH: Mr. Hance, you may sit down.

THE COURT: Sit down, please.

MR. R. SMITH: Your Honor, Mr. Hance has advised me that he wishes to offer no other evidence in mitigation except his own testimony.

THE COURT: Very well, then, we'll hear argument in the case, the State makes the first argument.

MR. W. SMITH: Yes, sir, will they-- I'd like to know before I argue, Your Honor, which counsel will argue for the defense.

THE COURT: Have you discussed with each other who is going to make the closing?

MR. R. SMITH: Yes, Your Honor, Mr. Hance has requested that I make the final argument.

THE COURT: All right, sir.

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

GEORGIA

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| | | |
|---|---|---|
| STATE OF GEORGIA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| Versus | ) | INDICTMENT NO. 40353 |
| | ) | |
| WILLIAM HENRY HANCE, | ) | |
| | ) | |
| Defendant. | ) | |

HEARING BEFORE:

THE HONORABLE KENNETH B. FOLLOWILL
SUPERIOR COURT
COLUMBUS CONSOLIDATED GOVERNMENT CENTER
COLUMBUS, GEORGIA

October 25, 1979

* * * * * * *

APPEARANCES

HONORABLE WILLIAM J. SMITH, District Attorney, Chattahoochee Judicial Circuit, Superior Court, Columbus Consolidated Government Center, Columbus, Georgia 31901, appearing on behalf of the State of Georgia; and

HONORABLE RICHARD O. SMITH, Public Defender, Columbus Consolidated Government Center, Columbus, Georgia 31901, and HONORABLE ALEX BYARS, of the firm of Jones and Byars, P. O. Box 164, Columbus, Georgia 31902, and MR. WILLIAM HENRY HANCE, appearing on behalf of the defendant.

REPORTED BY:

PAULA E. NIXON
Official Court Reporter
SUPERIOR COURT
P.O. Box 1366
Columbus, GA 31902

WHEREUPON:

(At 11:30 o'clock a.m. on the 25th day of October, 1979, Court was convened.)

THE COURT: The Court calls the case of the State of Georgia versus William Henry Hance, Indictment No. 40353, in the Superior Court of Muscogee County, Georgia, motion for new trial by and on behalf of the defendant. Mr. Smith, are you ready for the State of Georgia?

MR. WILLIAM SMITH: I am, Your Honor.

THE COURT: And Mr. Richard O. Smith appearing for the defendant, are you ready?

MR. RICHARD SMITH: Yes, sir, I'm ready.

THE COURT: At the trial itself, you, Mr. Smith, I believe, were principal counsel, Mr. Hance, the defendant, had asked for permission to serve as co-counsel and it was granted, and he did in fact participate in the case and was afforded the rights of counsel.

Mr. Hance, do you wish to act also as co-counsel in this hearing this morning, which is your motion for a new trial?

MR. HANCE: Yes, sir.

THE COURT: All right, then, also present this morning is Honorable Alex Byars, who has been appointed by the Court at the request of Mr. Richard O. Smith to assist in the preparation of this motion for new trial. And, Mr.

Hance, do you accept Mr. Byars also to help you in this case?

MR. HANCE: Yes, sir.

THE COURT: All right. Mr. Smith, you are the attorney for the movant, I'll hear from you first.

MR. RICHARD SMITH: Your Honor, we have filed this motion for a new trial basically on general grounds. Today we'd like to address the Court on two specific areas, actually the amendment to our motion, and those two areas would be, one, having to do with the confession and the admission of the alleged confession itself, we're going to ask the Court to reconsider its position on that. And the other, which Mr. Byars will discuss with the Court, has to do with the question of venue, in which we're going to ask the Court to look into that again and grant a new trial based on the fact the venue was not properly shown.

Then after that, Mr. Hance may have a remark he wants to make to the Court. I'm not aware of his intentions.

THE COURT: All right, sir. Anything that you wish to say at the outset, Mr. Smith?

MR. WILLIAM SMITH: No.

THE COURT: Very well, the motion for new trial, of course, is part of the record and it appears to be on the general grounds. Are you going to approach the question of the admission of alleged confession first?

MR. RICHARD SMITH: Yes, sir, I'll do that first. Your Honor, in considering the question of the confession in this case, it was somewhat unusual in that the confession was first obtained by the CID statements, Agent Fox and other agents with the CID, before the Columbus Police Department came into the matter. And, we alleged at the time of the trial that these confessions were improperly gained, and the Court overruled us at that time and admitted the confessions, and we're bringing before the Court now for further consideration this question, primarily based on the case of Williams versus the State in which nine factors were set forth to be considered in the question of whether or not a confession was voluntarily and freely given and to be admitted.

Our points have to do with, first the question of whether the accused is held incommunicado, or allowed counsel with relatives, friends or an attorney. The evidence we think in the case shows that Attorney David Clark, from his testimony and the testimony of the CID agents, attempted to communicate with Mr. Hance when he was in custody of the CID, that he sought and searched for him and was unable to locate him, though he called places where Mr. Hance was in fact being kept, and talked to people who should have been able to tell him that Mr. Hance was present. That Mr. Clark had been contacted by members of Mr. Hance's family based on his

previous representation of Mr. Hance in other legal matters not criminal in nature. And that because of Mr. Clark's searching for Mr. Hance and not being told where he was, Mr. Hance was in effect held incommunicado, unable to communicate with his lawyer. And the fact that Mr. Hance may have or may not have, he denies he did and they say he did, ask for an attorney, or said he didn't want an attorney, that is negated by the fact an attorney was looking for him, trying to find him to advise him, his attorney that represented him through other matters and was continuously his attorney. And his attorney would have found him and advised him to remain silent until he could talk the case over with him.

And we feel that this is holding him incommunicado within the meaning of the case, Williams versus the State, which is based on West versus United States, found at 399 Federal Second, 467 and 469, which is a 5th Circuit case in 1968. For that reason, we'd ask the Court again to consider granting a new trial in that the Court improperly admitted the confession.

We also bring up the point of the length of the confession, of the time it took to get the confession, which is one of the nine factors to be considered. The testimony at page 724 of the transcript from Mr. Fox says that Mr. Hance was questioned a total of 18 hours before he signed any

confession. And we submit to the Court that considering the length of time of the interrogation, 18 hours, brings into great question the voluntariness and the freeness of the confession. Mr. Fox stated that in the beginning of the questioning Mr. Hance denied everything, and only after 18 hours of constant interrogation did he finally sign a statement, and only after 18 hours of constant interrogation was he advised that he had an attorney seeking him. And by that time he had already made a statement and signed it.

We'd also ask the Court to consider as one of these factors that, at a subsequent date Mr. Hance completely repudiated the statement and said it was not true, it was based on being coerced by force to sign the statement, from physical and mental fatigue, that he had been deprived of food, any sustenance, he had been deprived of sleep, and that he was in great fear for his physical well-being, which brings into the factor of the methods being used during the interrogation. And we would suggest to the Court that the lack of the sleep, the small amount of food and drink, restraint from free bathroom privileges, the fact that two people constantly interrogated him over a period of time, that all these things should be considered in determining that he in fact was coereced or forced to make this confession and this statement. And, we feel that with all these things considered, as laid out in the case of

Williams versus the State, that the Court's ruling to admit the confession was not a proper ruling and should be reversed and the thing remanded for a new trial.

THE COURT: Would you like to address that?

MR. WILLIAM SMITH: May I have one moment, Your Honor?

THE COURT: Yes, sir.

MR. WILLIAM SMITH: Your Honor, of course, the transcript is here and available if the Court wishes to review it, or feel that it needs to on any of these particular points. Just one reference to, we would take exception to several of counsel's allegations on which his argument is based. He referred to 18 hours of constant interrogation. My recollection of the facts is contrary to that, that the man was not at any point in time interrogated for 18 consecutive hours.

THE COURT: Excuse me, I believe the phrase was a total of 18 hours.

MR. WILLIAM SMITH: Eighteen hours constantly was what I thought he said.

THE COURT: All right, sir.

MR. RICHARD SMITH: Your Honor, let me just clear it up and say that it was 10 hours one day and 8 hours the next, you're right, but it was a total.

MR. WILLIAM SMITH: Your Honor will recall the

facts and circumstances of the interrogation, and the transcript is here if Your Honor wishes to look at that.

Now, to address the matter of being held incommunicado, or being kept away from his attorney, an attorney who represented him and was trying to get in touch with him, if the Court wishes to review the testimony of Mr. David Clark, again it's in the transcript here and we'd be happy for the Court to look at it, at no time was Mr. Clark his attorney, at no time did he represent him in this matter, at no time had he been contacted by a member of the family to represent him in this matter. Mr. Clark's testimony was that he had represented Mr. Hance in a divorce matter at some time previously, that he read of the arrest in the paper and that he simply was trying to locate or get in touch with Mr. Hance on his own. And Mr. Clark's testimony was that he did not and does not try criminal cases, and that he never has represented the defendant in this case, and did not represent him at the time that he testified here.

The holding, on the other side of the fence, so to speak, the holding of the defendant incommunicado, I could not locate that specifically in the transcript. If the Court wishes to look at it we'll try to look it up, but my recollection that he was told when Mr. Clark did get in touch with the individuals who had him in their custody, military officials, that he was told that there was an attorney who

wanted to talk with him, and he said no, that he did not want to talk with the attorney. So, I do not believe that this constitutes holding one incommunicado, or from their attorney who represents them, or is retained by their family to represent them.

THE COURT: All right, if there's nothing further on that grounds, let's proceed to the matter of the venue.

MR. RICHARD SMITH: Your Honor, I would just briefly like to respond to Mr. Smith. Of course, as he says, the Court has the transcript. Mr. Clark had been his attorney and represented him in other matters and was carrying through, and I think Mr. Hance was advised Mr. Clark was looking for him after he had given his statement, and the police and the CID were aware of it long before the statement was given, and I think they at least had the burden to advise him that an attorney was trying to get in touch with him. Of course, we'll leave that to the Court to make its decision.

Mr. Alex Byars is going to address the question of venue.

MR. BYARS: Your Honor, in this particular case, I think the record reflects, from my reading of the record, in fact I'm certain that it does, that Mr. Smith, Mr. Rick O. Smith, representing Mr. Hance, made a motion for a directed verdict on the basis that venue was not proved in this case. Now, I was also informed by Mr. Smith that no particular

request to charge to it, a written request to charge, asking for a specific charge on the fact that the issue of venue must be proved beyond a reasonable doubt once it is put in issue, which I believe is the law, was given to the Court, but that Mr. Smith did make the motion for directed verdict, because the State failed to prove venue beyond reasonable doubt, and that it was an issue in this case. Now, the State's sole testimony in proving here that the venue was existent in this case is the testimony of Mr. James Webb, starting at page 493 of the transcript, and it is this testimony that I believe the State is relying on, it's the only testimony that I could find that was in the record, after reading the record, regarding as to whether or not this particular alleged crime of Mr. Hance occurred in Columbus, Muscogee County, Georgia.

If I may read to the Court just a short holding here out of the famous case of Parks versus the State, that citation is 212 Georgia 435, in that case the Supreme Court of Georgia held that proof of venue is part of the State's case, and a failure of the State to prove venue is cause for reversal. "This Court has many times held that venue is a jurisdictional fact and that it must be proved, and that the lack of sufficient evidence of venue is covered by the exception that the verdict is contrary to law and without evidence to support it."

In the case of Wilson versus the State, which is 6 Georgia Appeals 16, the Court of Appeals held that venue may be proved by circumstantial evidence with circumstances which show that it is possible the alleged crime was committed within the jurisdiction of the Court are insufficient to establish the jurisdictional evidence of venue, where, from the circumstances adduced it is as possible and reasonable that the crime was committed beyond the jurisdiction of the Court.

Your Honor, in this case, from my reading of quite a number of the cases, and due to the fact that Georgia has a Code Section, specifically 271103 that deals with boundary line cases, the importance of proper venue in this case cannot be underestimated inasmuch as the scene of the alleged crime, and where the body of Ms. Faison or Jackson was allegedly found happens to sit right on the boundary line of U. S. Government property. So, I think, if in fact the venue was not shown as we contend that it was not shown, this case would never, or possibly never should have been in the State Courts of Georgia, or the Superior Court of Georgia, and should have been perhaps tried under Federal jurisdiction, and we feel that for that reason we're not talking about just a mere case of where perhaps a body was found lying near a county line contiguous to another county line in the State of Georgia, but was found lying in an ambiguous area, possibly

on the Fort Benning reservation.

For that reason we think that not only have the cases held, interpreting the Georgia Constitution and the Statutes applying to venue forever and a day, that it's a jurisdictional fact required by the Constitution, and all legislative attempts to change that have been consistently reversed and overturned by the Georgia Supreme Court.

We also feel that, because of, as I just said, the fact that this alleged crime occurred in an area which is very possibly not in Muscogee County, Georgia, for that reason the burden was on the State to prove this beyond a reasonable doubt.

Now, going to the facts, after having cited a couple of these cases, and I won't go into citation upon citation of other cases, but I could furnish some other cases if the Court wants me to do so later, showing how important venue becomes when the issue is raised by the defense as it was by Mr. Smith in the course of the trial, and particularly here where we have a case where the crime possibly, if indeed there was one, was possibly committed not only just outside the jurisdiction of this county, but also outside the jurisdiction of the State of Georgia. So, I think it's highly crucial that the State have proved its case of venue beyond a reasonable doubt.

Your Honor, referring back to, as I was getting

ready to start into, about the testimony of Mr. James D. Webb, who is the City Engineer here in Columbus, Georgia, and I might add a mighty fine man and I think we all like him, but in this particular case on page 493 of the transcript and page 494, Mr. Smith, Mr. Bill Smith, that is, the District Attorney, asked on page 494, "Mr. Webb, were you shown a scene where a body was found by Agent Wanninger?"

Mr. Webb, in response to that question said, "Yes."

The next question by Mr. Smith was, "All right, is the point that you were shown where the body of Brenda Jackson, or Brenda Gail Faison, was found by Agent Wanninger, located in Muscogee County, Georgia?"

"Yes."

And number one, that is, his answer, Mr. Webb's answer to Mr. Smith's question, was based on hearsay, it was based on what Mr. Smith told him that Agent Wanninger told him about where the body was located. Mr. Webb never saw the body of the corpus delicti, or whatever you want to call it, he did not know where it was located, he was merely informed that that was where the body was located by what somebody else said. And, Your Honor, that being hearsay means that that has absolutely no probative value, the Court cannot even consider it, if there's no objection made it still has no probative value. And Mr. Webb's determination of venue being correct on the basis of where he was told

Mr. Wanninger said the body was can have absolutely no probative value and no venue was shown.

Furthermore, in Mr. Hance's cross-examination, even assuming that that did establish venue, Mr. Webb says, in response to a question by Mr. Hance, "Did you-- were there any measurements taken?"

This is also on page 494 of the transcript. "By walking, yes, step pacing."

Then Mr. Hance asked Mr. Webb, "I mean actual measurements."

Mr. Webb responded, "No actual measurements by taking, but by stepping."

Then the next question by Mr. Hance was, "So, you're saying-- well, how can you be sure that it's in Muscogee County when you didn't really get any-- you didn't make any measurements, you just made steps?"

Then Mr. Webb goes on into what a step normally is, and talking about the right of way of the reservation, and whatnot. He said he had been in this business long enough to know when he's gone 30 feet.

Your Honor, the whole-- and then in response to another question he said, he was asked how many times he had done it, and he said, "Once."

The State's case of venue rises or falls on Mr. James D. Webb's testimony. And, Your Honor, I would submit

that because the prerequisites for proof of venue in Georgia are so strict, and because the District Attorney has sought to prove his case based on hearsay testimony, which ultimately has no probative value and cannot even be considered by the Court, Mr. Webb did not see that body, it was where Mr. Webb was told that body was, and because the State builds its case of venue on Mr. Webb, and it's on something that has no probative value, Your Honor, I would say a new trial would have to be granted on that basis alone, even assuming arguendo that he did show it, although we strenuously contest that he didn't, it was an issue that was in fact.

And then, Your Honor, I would like to get into the fact that I think the Court, because venue was in issue should have made a specific charge on venue. Your Honor, the cases that I have read on venue the last few days have told me, or I have read them to say, that if the defense does not put venue into issue, and the State makes a showing of venue, then it is a matter for the Court to determine whether venue is shown, and at that point the State, excuse me, the Court, Your Honor, does not have to make a specific charge as to venue. And I think I can get you cases on this, Your Honor, if you want to see them.

However, if the defense raises the issue of venue and it becomes in issue, which Mr. Smith and Mr. Hance did

do, then a charge that venue is proved by the State beyond a reasonable doubt, just like every other element of the crime, has got to be shown, Your Honor, and a charge is in order specifically on the point of venue at that time.

And, Your Honor, referring back to your charge, I made notations on my copies of the transcript here, and just what manners and forms Muscogee County, or in any straying type way venue was mentioned in your charge, and, Your Honor, I respectfully submit to the Court that no specific charge as would be required was given. This is assuming, Your Honor, we're not, by me saying all this I am not coming back, or coming off of our position that they proved it at all, we think that a motion for new trial should be granted merely on the basis that it was proved by hearsay, nonprobative evidence, but this is just saying assuming arguendo that that was deemed by the Court, Your Honor, to have been shown by probative value evidence, which we say that it wasn't, that even then a motion for new trial should be granted because of the fact that it was not specifically charged by the Court, Your Honor.

Page 1080 of the transcript, two places there, Your Honor, you referred to, "in the County of Muscogee, in the State of Georgia," and that could possibly be construed as giving, or requiring proof of venue. Also the last paragraph on page 1082 there is also, you state that,

"Every element of the charge must be proved beyond a reasonable doubt." And, Your Honor, the only other mention possibly of venue in the charge by the Court is on page 1095, where again you did refer to "in the County of Muscogee, State of Georgia."

But, Your Honor, I would submit that even if this Court did deem the testimony of James D. Webb as being sufficient, although we highly and strenuously say that it is not sufficient as a matter of law, that even if the Court did make that determination that the charge on venue was insufficient, because the defense put in issue as to whether or not venue was proved beyond a reasonable doubt, and for that reason a specific charge as to venue alone should have been given to clarify that with the jury, and adding the particular importance with which venue does have in this case, since the site of the purported crime where the alleged corpus delicti was found could very easily have been on U. S. Government property, Your Honor.

MR. WILLIAM SMITH: Your Honor, venue is an essential element of every crime in Georgia, as the Court very well knows. It is my understanding of the law, I likewise do not have any, I think a general case was cited, but it's my understanding of the law that slight evidence of venue is sufficient. I would point out to the Court that the only evidence, and I underline the words "only

evidence," of venue is the testimony of James Webb, page 493 of the transcript of evidence. The reason I point this out is, counsel has stated that venue was put into issue by the defense, and I dispute this, that it was put into issue. There is absolutely no other evidence other than this man's testimony, who went to this scene where the body was found, and who swore in this Court under oath that this was in Muscogee County, Georgia.

Now, the defense brought in no one, neither the defendant himself, nor any other witness to give any evidence to the contrary, hence this is the only evidence, and merely the asking the Court to direct a verdict on venue I submit does not quote "put this matter in issue," there's no other evidence, this is the only evidence the Court passed on on this matter at the time of the directed verdict, this being the only evidence.

THE COURT: Did Agent Wanninger testify that he pointed out the spot to Mr. Webb and then later Mr. Webb said, "The spot pointed out to me by Agent Wanninger where the body was is in Muscogee County, Georgia"?

MR. WILLIAM SMITH: I do not recall that, Your Honor, he may have, he may not have, I don't know.

MR. RICHARD SMITH: Your Honor, if I may just make a couple of brief remarks to what Mr. Smith said, and I made in my argument. Number one, Your Honor, I think we did put it

an issue, but to ask the defendant to come in and prove, or show evidence that he committed a crime in another jurisdiction in order to put venue in issue would seem to me an absurdity, Your Honor, it's in issue because they didn't prove it, and we claim they didn't prove it. On page 1047, I mean, excuse me, 1037 of the transcript Mr. Smith, Mr. Rick Smith, made his objection at that point, Your Honor, and raised that he felt that a directed verdict should be given in favor of the defendant for failure to prove venue.

Your Honor, the only other thing I would add, is again, and I agree with Mr. Bill Smith on this, that the only evidence of venue was given by Mr. Webb, and his testimony, Your Honor, was based on what someone else told him as to where the corpus delicti was, the alleged corpus delicti, that is-- where the corpus delicti is is the determining factor of what venue takes place, Your Honor, where it is, what locale, and his testimony, based on what somebody told him as to where the corpus delicti was, is without probative value, it's hearsay, with or without objection, it is still without probative value and cannot even be considered by the Court, and since that is the only evidence as to venue, Your Honor, I think the motion for directed verdict should have been granted, and as to what the law is at this stage, whether we would be entitled to a new trial or what, but I think that if this Court finds at this point that venue was

not proved, that a motion for new trial would not be in order-- well, since we're the moving party it would be, motion for new trial would be in order, Your Honor. I think it wouldn't be double jeopardy since we're the moving party, but we would ask that it be granted.

THE COURT: All right, is there anything else?

MR. HANCE: Yes, sir, Your Honor, just one point, before the trial even came about, Your Honor, on December of '78, or the same week of the arrest, I wish the Court to take into consideration that the defendant here didn't receive a Recorder's Court hearing. That's all.

THE COURT: All right.

MR. RICHARD SMITH: That concludes our motion.

THE COURT: Taking the last of the grounds first, I do not believe that if it's true that a Recorder's Court hearing was not afforded to the defendant that it would be properly raised at this time. I don't really think it would have made any difference anyway, so if that is an additional ground for the motion for new trial it's overruled.

As to the venue, I'm certainly aware of the importance of proving venue in every case and certainly where there is a question so close as this is between the jurisdiction of the Federal Government and of the State of Georgia, but it appears to me, as it did at the trial, that there was evidence put in to show that a spot which had been

pointed out to the witness, Webb, and identified for him as the place where something happened, and he was asked, if he were asked where it was, and he said this was in Muscogee County, Georgia, is proof of that fact. It would then be an issue for the jury to determine whether or not it was in Muscogee County, Georgia.

As far as the specificity of the charge is concerned, I don't have the charge before me, but I do believe that I correctly charged the jury that every essential element of the crime must be proved, that they would have to believe that this took place in Muscogee County, Georgia, and therefore it was put before them to determine that, along with any other elements of the offense.

So, I will deny the new trial on the grounds that we have identified here as the question of venue.

With repect to the admission of the confession, I believe the proper steps were taken to determine whether it was admissible from all standpoints, and that the jury was allowed then to hear virtually all of that same evidence and were properly charged what they must find insofar as voluntariness, freeness, duress, coercion, reward, threat, and so forth, that again being a question of fact for them to decide, and they apparently resolved it for themselves in such a way as to, I should say, not to find against the State. And whether or not they considered the confession,

we don't know, we were not in the jury room with them, we presume they did consider the confession, as to what weight they might have given it we don't know, all we know is that the verdict was adverse to the defendant in the case. I think though, as a matter of law, the Court properly admitted into evidence the statement made by the defendant, and the Court also had heard all the evidence with respect to whether he was being held incommunicado, whether Mr. David Clark was trying to reach him, and for what purpose, the repudiation that the defendant is said to have made, the testimony with respect to furnishing him food and bathroom privileges. So, all in all, I think that these questions then also appeared before the jury and, as I say, they resolved them in favor of the State, and against the defendant. Therefore, the motion for new trial is denied.

I'll ask you, Mr. Byars, if you will continue to participate in the case, if it is the defendant's desire to appeal this decision, I wish that you would assist him. Mr. Smith, I hope that you will continue to do the good job that you've been doing also in the case. Is there anything further?

MR. RICHARD SMITH: That's all we have.

THE COURT: The Court stands recessed.

(COURT WAS ADJOURNED.)

CERTIFICATE OF REPORTER

STATE OF GEORGIA )

MUSCOGEE COUNTY )

I, PAULA E. NIXON, Official Court Reporter for the Chattahoochee Judicial Circuit, do hereby certify that the hearing in the case of State of Georgia versus William Henry Hance was heard on the 25th day of October, 1979, that I was authorized to and did report on a shorthand machine the proceedings and evidence in the said hearing, and that the foregoing pages, numbered 1 to 22 inclusive, constitute a true and correct transcription of my shorthand report of the proceedings of said cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 31st day of October, 1979, at Columbus, Muscogee County, Georgia.

Paula E. Nixon
Certified Court Reporter
Certificate No. A-411

GEORGIA, MUSCOGEE COUNTY
CLERK'S OFFICE, SUPERIOR COURT
FILED IN OFFICE
NOV 9 - 1979
Mike Miller
DEPUTY
CLERK SUPERIOR COURT

GEORGIA, MUSCOGEE COUNTY:

CLERK'S OFFICE SUPERIOR COURT:

I, James L. Stubbs, Clerk of the Superior Court of Muscogee County, Georgia, do hereby certify that the foregoing is the original copy of the reporter's transcript of the hearing on the Defendant's Motion for New Trial filed in this office.

Witness my signature and the seal of said court hereto affixed, this _____ day of January, 1980.

Clerk, Superior Court
Muscogee County, Georgia

Report of The Trial Judge

of the

Superior Court of Muscogee County, Georgia

The State vs. William H. Hance
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

1. Name Hance (Last,) William (First) Henry (Middle) 2. Date of Birth 11/10/51 (Mo. Day Ye

3. Social Security Number 226 74 1289

4. Sex: M [x] F [ ] 5. Marital Status: Never Married [ ] Married [ ] Divorced [x] Spouse Deceased [ ]

6. Children
(a) Number of children 1
(b) Ages of children: 1 2 (3) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)

7. Father living: yes [xx] no [ ] If deceased, give date of death _____

8. Mother living: yes [ ] no [x] If deceased, give date of death Nov., 197

9. Number of children born to parents 2

10. Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 11 (12) 13 14 15 16 [ college
(Circle one)

11. Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [xx] 84
(IQ above 100) High [ ]

12. Psychiatric Evaluation Performed? Yes [x] No [ ]
If performed is defendant:
a. Able to distinguish right from wrong? [x] [ ]
b. Able to adhere to the right? [ ] [ ]
c. Able to cooperate intelligently in his own defense [x] [ ]

13. If examinedd, were character or behavior disorders found? Yes [x] No [ ]
(If answer is yes please elaborate) See 14

14. What other pertinent psychiatric [ and psychological] information was reve

Good physical condition; dull-normal intelligence; anxious, depressed, apathetic; expressed feelings of worthlessness. No previous mental health contact. Not psychotic.

15. Prior Work Record of Defendant:

| | Type Job | Pay | Dates Held | Reason for Termination |
|---|---|---|---|---|
| a. | U. S. Army - E4 | $720/Month | Feb. '76 - Present | |
| b. | U. S. Marines - Sgt. | $680/Month | May '71 - Oct. '75 | Attempt to Save Marriage |
| c. | | | | |
| d. | | | | |
| e. | | | | |

(A separate report must be submitted for each defendant sentenced to death

## B. Data Concerning the Trial

1. Was the case tried with or without jury? With [xx] Without [ ]

2. How did the defendant plead? Guilty [ ] Not guilty [xx]

## C. Offense Related Data

1. Capital Offense for Which Penalty Imposed:
   a. Treason.....[ ]
   b. Murder.....[xx]
   c. Kidnapping for Ransom.....[ ]
   d. Kidnapping where Injury Results.....[ ]
   e. Aircraft Hijacking.....[ ]
   f. Rape.....[ ]
   g. Armed Robbery.....[ ]

2. Were other offenses tried in the same trial? yes [xx] no [ ]

   If other offenses were tried in the same trial list those offenses.

   a. Criminal Attempt to Commit Theft by Extortion
   b. _____
   c. _____
   d. _____

3. If tried with jury, did the jury recommend the death sentence? Yes [xx] No [ ]

4. Statutory aggravating circumstances found: Yes [xx] No [ ]

5. Which of the following statutory aggravating circumstances were instruct and which were found?

| | Instructed | Fou |
|---|---|---|
| a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or | [ ] | [ |
| (2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions. | [ ] | [ |
| b. (1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in, the commission of another capital felony, or aggravated battery or | [ ] | [ |
| (2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree. | [ ] | [ |
| c. The offender by his act of murder, armed robbery, or kidnaping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be haz- | [ ] | [ |

| | Instructed | Found |
|---|---|---|
| d. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value. | [ ] | [ ] |
| e. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty. | [ ] | [ ] |
| f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person. | [ ] | [ ] |
| g. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. | [xx] | [x] |
| h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties. | [ ] | [ ] |
| i. The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement. | [ ] | [ ] |
| j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another. | [ ] | [ ] |

. List non statutory aggravating circumstances indicated by the evidence, if any.

a. _____

b. _____

c. _____

d _____

. Was there evidence of mitigating circumstances? Yes [ ] No [x]

. If so, which of the following mitigating circumstances was in evidence?

| | |
|---|---|
| a. The defendant has no significant history of prior criminal activity. | [ ] |
| b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. | [ ] |
| c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. | [ ] |
| d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct. | [ ] |

f. The defendant acted under duress or under the domination of another person. [ ]

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [ ]

i. Other. [ ]
Please explain if (i) is checked _____

_____

_____

9. If tried with a jury, was the jury instructed to consider the circumstances indicated in 8 as mitigating circumstances? Yes [ ] No [xx]

10. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [xx]

11. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [x] No [ ]

12. Was the victim related by blood or marriage to defendant? Yes [ ] No

13. If answer is yes, what was the relationship? _____

_____

_____

14. Was the victim an employer or employee of defendant? No [xx]
Employer [ ]
Employee [ ]

15. Was the victim acquainted with the defendant? No [xx]
or Casual Acquaintance [xx]
Friend [ ]

16. Was the victim local resident or transient in the community? Resident [ ] (visitin
Transient [xx] Aunt, f
Miami)

17. Was the victim the same race as defendant? Yes [xx] No [ ]

18. Was the victim the same sex as the defendant? Yes [ ] No [xx]

19. Was the victim held hostage during the crime? No [xx]
Victim (prostitute) probably accompanied Defendant willingly to wooded scene. Yes - Less than an hour [ ]
Yes - More than an hour [ ]

20. Was the victim's reputation in the community: Good [ ]
Known prostitute (convicted) Bad [xx]
Unknown [ ]

21. Was the victim physically harmed or tortured? Yes [xx] No [ ]
If yes, state extent of harm or torture: Confession stated Defendant

2. What was the age of the victim? 21

3. If a weapon was used in commission of the crime was it?

| | |
|---|---|
| No weapon used | [ ] |
| Poison | [ ] |
| Motor Vehicle | [ ] |
| Blunt Instrument | [xx] |
| Sharp Instrument | [ ] |
| Firearm | [ ] |
| Other _____ | [ ] |

4. Does the defendant have a record of prior convictions? Yes [ ] No [ ]
Given pre-trial probation 10 yrs. ago for assault on female w/ intent to maim.

5. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed: (Lexington, V

| Offense | Date of Offense | Sentence Imposed |
|---|---|---|
| a. Felonious & Malicious Wounding | Feb. 11, 1969 | Pre-Trial Probation |
| b. | | |
| c. | | |
| d. | | |

6. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [x]

7. Was the defendant a local resident or transient in the community?
Resident [x] Stationed at Ft. Benn
Transient [ ]

## D. Representation of Defendant *

1. Date counsel secured April 14, 1978

2. How was counsel secured? a. Retained by defendant [ ]
b. Appointed by Court [xx]

3. If counsel was appointed by court was it because
a. Defendant unable to afford counsel? [x]
b. Defendant refused to secure counsel? [x]
c. Other (explain) Defendant insisted on his right to represent himself, but Public Defender was appointed to sit with Defendant, and advise him when requested. [x]

4. How many years has counsel practiced law? a. 0 to 5 [ ]
b. 5 to 10 [xx]
c. over 10 [ ]

5. What is the nature of counsel's practice? a. Mostly civil [ ]
b. General [ ]
c. Mostly criminal [xx]

6. Did the same counsel serve throughout the trial? Yes [xx] No [ ]

7. If not explain in detail. _____

## E. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [

3. What percentage of the population of your county is the same race as the defendant?

   a. Under 10%.....[ ]
   b. 10 to 25%.....[ ]
   c. 25 to 50%.....[x]
   d. 50 to 75%.....[ ]
   e. 75 to 90%.....[ ]
   f. Over 90%.....[ ]

4. Were members of defendant's race represented on the jury? Yes [xx] No [

5. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [

7. Was there extensive publicity in the community concerning this case? Yes [xx] No [

8. Was the jury instructed to disregard such publicity? Yes [ ] No [

9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [

10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [

11. If answer is yes, what was that evidence? _____

12. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case The death penalty is appropriate under the evidence, which showed a vicious, unprovoked attack on the victim, resulting in most of her head being destroyed and removed.

## F. Chronology of Case

| | | Elapsed Days |
|---|---|---|
| 1. | Date of Offense Feb. 28, 1978 | |
| 2. | Date of Arrest April 5, 1978 | |

Date post-trial motions ruled on Nov. 30, 1979

Date Trial Judge's Report Completed December 18, 1979

*Date Received by Supreme Court _____

*Date Sentence Review Completed _____

*Total Elapsed Days _____

* To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached (X)
2. He stated he had no comments ( )
3. He has not responded ( )

8 January 1980
Date

Kenneth A. Fallaw
Judge, Superior Court of

Muscogee County

Richard O. Smith
ATTORNEY AT LAW

P.O. BOX 39
825 SECOND AVENUE
COLUMBUS, GEORGIA 31902
PHONE (404) 322-5531

January 7, 1980

Judge Kenneth Followill
Government Center
Columbus, Georgia

Re: William Henry Hance
Report of Trial Judge

Dear Judge Followill:

Please consider the following comments and attach them to your report of the Trial Judge.

1. Page 4 - #21: There is no evidence presented either in Defendant's statement or elsewhere that he intentionally broke the victim's arm. The arm was apparently inadvertently broken in trying to pull the body from one place to another.

2. Page 5 - #D-3: Attorney Walter Johnson also assisted the Defendant by appointment of the Court in this matter. He has practiced law from 5 to 10 years and his practice is general.

3. Page 1 - #13 and 14: Evidence was introduced at a pre-trial hearing to indicate that Dr. Lu Lieberman had examined Defendant at the Muscogee County Jail. Dr. Lieberman reported that there were some definite character disorders; however, Defendant specifically requested that the matter not be pursued any further.

Other than these observations, the remainder of the report seems to be in order. Thank you for the opportunity to examine this report.

Very truly yours,

RICHARD O. SMITH

ROS/md

GEORGIA, MUSCOGEE COUNTY:

CLERK'S OFFICE SUPERIOR COURT:

I, James L. Stubbs, Clerk of the Superior Court of Muscogee County, Georgia, do hereby certify that the foregoing is the original copy of the report of the trial judge filed in this office by the Honorable Kenneth B. Followill.

Witness my signature and the seal of said court hereto affixed, this _____ day of January, 1980.

_____
Clerk, Superior Court
Muscogee County, Georgia